Supreme Court, U.S.
FILED

No. 03-03 271 AUG 18 2003

In The
Supreme Court of the United States

CAVALIER TELEPHONE, LLC,
Petitioner,

v.

VERIZON VIRGINIA INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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160 pp

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err by affirming the District Court's dismissal of petitioner's antitrust claims?

PARTIES TO THE PROCEEDING

The petitioner is Cavalier Telephone LLC ("Cavalier"). The respondent is Verizon Virginia Inc.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Cavalier states that no publicly held company owns 10% or more of its ownership interests and that it is wholly owned by Cavalier Telephone Corporation, a Delaware corporation.

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PETITION FOR A WRIT OF CERTIORARI

Cavalier Telephone, LLC ("Cavalier") respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion and judgment of the court of appeals are reported at 330 F.3d 176 (4th Cir. 2003), and are reproduced in the appendix to this petition ("App.") at 1-39. The judgment of the United States District Court for the Eastern District of Virginia is reported at 208 F.Supp.2d 608 (E.D. Va. 2002), and is reproduced at App. 40-65

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 2 of the Sherman Act, 15 U.S.C. § 2, sections 251 and 252 of the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252, are set out in App. 112-137.

STATEMENT OF THE CASE

This Court has already granted *certiorari* in a case raising the important question at issue in this case concerning the scope of an alleged monopolist's duties under Section 2 of the Sherman Act. See *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko,*

L.L.P., No. 02-682, *petition for cert. granted* (Mar. 10, 2003). As in *Trinko*, as well as another similar case, *BellSouth Corp.* v. *Covad Communications Co.*, Case No. 02-1423 (*petition for certiorari* filed Mar. 20, 2003), this case involves whether competitors may sue former local telephone monopolies for antitrust violations, when some of the allegedly anticompetitive conduct may also violate the Telecommunications Act of 1996 ("the 1996 Act"), codified at 47 U.S.C. §§ 151 *et seq.* Because the underlying antitrust merits issues in *Trinko* and this case are the same, the Court should, at a minimum, hold this petition pending the decision in *Trinko*.

Cavalier commenced the case below on November 1, 2001, when it filed a complaint against Verizon Virginia Inc. ("Verizon"), detailing Verizon's exclusionary conduct (Compl. ¶ 28-152, App. 72-91, explaining how that conduct delayed and undermined Cavalier's entry into the local telephone market (*id.* at ¶ 153-59, App. 92), and describing how that conduct, in turn, violated the antitrust laws (*id.* at ¶ 170-197, App. 94-98).

Verizon moved to dismiss, arguing that Cavalier alleged only violations of the 1996 Act. The District Court agreed and dismissed Cavalier's claims, following *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). Cavalier appealed the next day, but the Fourth Circuit affirmed, also following *Goldwasser*. Meanwhile, the Second and Eleventh Circuits split from *Goldwasser*, reversing dismissals of similar claims in *Law Offices of Curtis V. Trinko, LLP* v. *Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002) and *Covad Communications Co.* v. *BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002).

Verizon's parent company successfully sought review of *Trinko* in this Court, now docketed as Case No. 02-682, and BellSouth Corporation has sought review of *Covad*, through a petition filed in this Court in Case No. 02-1423. Cavalier brings this petition because the Fourth Circuit has entered a decision in conflict with decisions by the Second and Eleventh Circuits, on an important question of federal law that has not been, but should be, settled by this Court.

REASONS FOR GRANTING THE PETITION

This Court should hold this petition pending resolution of *Trinko* and grant the petition if the antitrust merits issues are not fully resolved. The decision below directly conflicts with decisions from the Second Circuit and Eleventh Circuit. The question presented here has been addressed at length in petitions and briefs filed by the parties and amici in Cases No. 02-682 and 02-1423, including advocacy of Cavalier's position by AT&T Corporation ("AT&T"), and advocacy of the opposing position by the U.S. Department of Justice and the Federal Trade Commission. Cavalier will therefore make its case briefly.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH DECISIONS IN THE SECOND CIRCUIT AND THE ELEVENTH CIRCUIT.

Verizon's parent company has rightly argued that the *Trinko* and *Goldwasser* decisions squarely conflicted with each other. The Fourth Circuit's decision below now joins *Goldwasser* in conflict with

the decisions in both *Trinko* and *Covad*. However, as Cavalier argues below, the four cases present very different underlying allegations. These differences make this case the best one in which to decide the question presented in all four cases—whether conduct that may also violate "affirmative duties" imposed by the 1996 Act can be challenged as federal antitrust violations.

The decision in *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) spawned the idea that competitors could not rely on the federal antitrust laws to challenge anticompetitive conduct by an incumbent local exchange carrier, or ILEC—that is, anticompetitive conduct by a local telephone service provider that once enjoyed a state-sanctioned monopoly. In that decision, the Seventh Circuit first knocked down the straw-man notion that "violation of a 1996 Act requirement automatically counts as exclusionary behavior for purposes of Sherman Act § 2." *Goldwasser*, 222 F.3d at 400 (7th Cir. 2000). The court then leapt to the idea that, because "the 1996 Act imposes duties...not found in the antitrust laws," the relevant antitrust inquiry was "whether anything the plaintiffs have alleged can be divorced from its 1996 Act context such that it states a free-standing antitrust claim." *Id.* at 401.

With this tool in hand, the Seventh Circuit found the allegations deficient because they were "inextricably linked to the claims under the 1996 Act" and because "the procedures established under the 1996 Act for achieving competitive markets" were not "compatible with the procedures that would be used to accomplish the same result under the antitrust laws."

Id. at 401. Perhaps it was the putative class action status that led to concern that "[t]he elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action." *Id.* Perhaps the Seventh Circuit's concern stemmed from the court's conclusion that "[l]ong before the 1996 Act ... it had become clear that comprehensive regulation of the rapidly advancing telecommunications markets was not a task well suited to the federal courts." *Id.* at 393. Whatever the case, the Seventh Circuit focused on the 1996 Act, and not on a straightforward antitrust analysis, to affirm dismissal of the plaintiffs' claims.

The Second Circuit took a very different view of another consumer's putative class action complaint in *Law Offices of Curtis V. Trinko, LLP* v. *Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002). As in Goldwasser, the complaint in Trinko was dismissed on the theory that 'a monopolist does not have a general duty to cooperate with its competitors." *See Trinko*, 305 F.3d at 107. The Second Circuit reversed that dismissal, reasoning that "[w]hile some of this conduct might also violate [47 U.S.C. §] 251, these are not merely allegations that section 251 has been violated." *Id.* at 108.

Analyzing the claims under essential facilities and monopoly leveraging theories, the Second Circuit rejected Goldwasser's requirement that "an allegation that otherwise states an antitrust claim must not rely on allegations that might also state a claim under another statute." *Id.* at 109. The Second Circuit also flatly rejected *Goldwasser*'s contention that a pro-

competitive statute like the 1996 Act necessarily invokes procedures inconsistent with those available under the Sherman Act—relying on antitrust claims upheld in a case that also involved a federal, pro-competitive statute, the Federal Power Act. *Id.* at 110 (discussing *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973)).

Like Cavalier, the plaintiff in *Trinko* suggested that breach of an interconnection agreement may be "a means by which the ILEC improperly excludes competition from the market" and thus a violation of the antitrust laws—not "merely" a violation of the 1996 Act. As the Second Circuit put it in harmonizing the laws, "ideally, the regulatory process alone would be enough to bring competition to the local phone service markets, [but] it is possible that the antitrust laws will be needed to supplement the regulatory scheme, especially with respect to injury caused to consumers." *Id.* at 112 (footnotes omitted).

This origin of *Goldwasser* and *Trinko* in consumer claims distinguishes those decisions from the claims brought by competitors in Covad and Cavalier. However, *Covad* and *Cavalier* contrast just as strongly as *Goldwasser* and *Trinko*, not just in their outcomes, but also in their approaches to the antitrust claims at issue in each case. In *Covad Communications Co.* v. *BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), the Eleventh Circuit agreed with *Goldwasser* "that merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations." *Covad*, 299 F.3d at 1283. Like the Second Circuit in *Trinko*, however, that was the extent of the Eleventh Circuit's agreement with *Goldwasser*.

The Eleventh Circuit's departure from *Goldwasser* began with its rejection of the lower court's ruling "that a Sherman Act antitrust claim cannot ever be brought if it alleges conduct also covered by the 1996 Act." *Covad*, 299 F.3d at 1282. The Eleventh Circuit also agreed with the Second Circuit that "'controlling case law does not support the theory that specific legislation meant to encourage competition necessarily takes precedence over the general antitrust laws.'" *Id.* (quoting *Trinko*, 305 F.3d at 111). The court then reviewed Covad's claims of antitrust violations through denial of essential facilities, refusal to deal, price squeeze, and monopoly leveraging. *Covad*, 299 F.3d at 1284-91. In each instance, it found that Covad had alleged a valid claim for purposes of Rule 12(b)(6) of the Federal Rules of Civil Procedure, and that the defendant's arguments to the contrary were mostly "factual in nature." *Id.* at 1291.

The analysis conducted by the Eleventh Circuit was precisely what Cavalier had urged in the Fourth Circuit for its claims of outright monopolization (Compl. ¶¶ 171-75, App. 94-95), refusal to deal (*id.* ¶ 176, App. 95), denial of essential facilities (*id.* ¶¶ 177-80, App. 95), prices squeeze (*id.* ¶ 181-82, App. 96), attempted monopolization (*id.* ¶¶ 188-91, App. 97), and leveraging (*id.* ¶¶ 192-93, App. 98). Cavalier's argument fell on deaf ears, for the Fourth Circuit panel's opinion scarcely mentioned any of these terms. Remarkably, only the dissenting opinion discussed the essential facilities claim. *Cavalier*, 330 F.3d at 191-94 (dissenting).

In place of Covad's straightforward analysis, the Fourth Circuit viewed Cavalier's claims through *Goldwasser*'s prism, and found only violations of the

1996 Act. To support its view that conduct alleged by Cavalier violated the 1996 Act but could not be the basis for antitrust claims, the court read the 1996 Act's savings clause as preserving the federal antitrust laws in stasis, as they existed when the 1996 Act was enacted. *Id.* at 189. Also, like the Seventh Circuit in *Goldwasser*, the court also divined an unspoken Congressional intent to create parallel, inviolably separate enforcement schemes under the 1996 Act and the antitrust laws. *Id.*

From these newly minted notions, the Fourth Circuit found that Cavalier had alleged only breaches of "affirmative duties" imposed by the 1996 Act, and that such violations could not serve as the basis for any federal antitrust claims. *Cavalier*, 330 F.3d at 189. This idea flowed from the court's conclusion that "a natural monopolist's legal refusal to deal is not made an illegal refusal to deal under the antitrust laws when Congress requires the monopolist to deal with competitors through duties imposed by the [1996 Act]." *Id.* at 190. However, it clashed with the court's purported refusal to "conclude that every complaint that states violations of [the 1996 Act] cannot for that reason alone also state a claim for violations of the Sherman Act." *Id.* at 189. Thus, while disavowing any intent to paint with too broad a brush, the Fourth Circuit dismissed Cavalier's claims under essentially the same rule stated by the lower court in *Covad*.

Finally, the Fourth Circuit dismissed Cavalier's essential facilities claim with a single comment: "When Virginia lifted its ban on competition in the local telecommunications industry, Verizon would not have been obligated to rent its facilities and provide access

to its elements to competitors to enable them to enter the market, and a complaint that alleges that it had a duty to do so under the antitrust laws would fail to state a claim upon which relief could be granted." *Id.* at 190. That conclusion was unencumbered by even the slightest mention of any antitrust precedent. Like *Goldwasser*, the decision below simply substituted an idiosynractic reading of two statutes for the type of precedent and analysis followed in *Trinko* and *Covad*.

As a result, the claims brought by the competitors—Covad and Cavalier—met conflicting fates before the Fourth Circuit and the Eleventh Circuit, just as the claims brought by consumers met conflicting fates in the Second and Eleventh Circuits. In *Trinko* and *Covad*, the Courts of Appeals both analyzed whether the plaintiffs alleged a valid antitrust claim under established pleading standards and antitrust precedent. By contrast, *Goldwasser* and the Fourth Circuit's decision below relied upon an anomalous reading of the 1996 Act to preclude liability that would otherwise attach under the federal antitrust laws. Cavalier respectfully submits that this Court should therefore hold Cavalier's petition until it decides this split of authority in *Trinko*, or grant Cavalier's petition if the issue is not decided in *Trinko*.

II. THE FOURTH CIRCUIT DECIDED AN IMPORTANT QUESTION THAT THIS COURT SHOULD SETTLE.

As noted above, this Court granted the petition for writ of certiorari filed in *Trinko*, Case No. 02-682, by the parent company of respondent, Verizon. The Court certified the following question: "Did the Court of

Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?" If the Court does not decide the issue in *Trinko*, then this Court should grant a writ of certiorari in this case to decide the important question of whether competitors may sue former local telephone monopolies for antitrust violations, when some of the allegedly anticompetitive conduct may also violate the 1996 Act. The Court should decide this question for several reasons.

First, the question certified in Case No. 02-682 leaves it unclear whether this Court intends to decide the indirect purchaser issue presented in *Trinko*, 305 F.3d at 105-07, or whether the Court will instead reach the issue of the relation between the 1996 Act and the federal antitrust laws. If the Court intends to address only the indirect purchaser issue, then Cavalier respectfully submits that its petition should also be granted, to resolve the important question of how the 1996 Act and the federal antitrust laws are interpreted together.

Second, as pointed out in the Brief of AT&T Corporation, Cavalier Telephone, LLC, and the Competitive Telecommunications Association as *Amici Curiae* in Support of Respondent, in Case No. 02-682, at 3-4 n. 2, the services actually at issue in *Trinko* were special access circuits provided by Verizon under §§ 201-205 of the Communications Act of 1934, 47 U.S.C. §§ 201-205, and not unbundled network elements provided pursuant to the 1996 Act. Therefore, unlike *Goldwasser*, *Covad*, and the instant case, *Trinko* does not present the same issue of the relationship between the 1996 Act and the federal antitrust laws.

Third, despite the Fourth Circuit's emphasis on the 1996 Act's role as a "parallel but distinctly different approach to jump-start and accelerate competition," *Cavalier*, 330 F.3d at 188, the 1996 Act's emphasis on interconnection among carriers and just, reasonable, and non-discriminatory terms traces back to the initial enactment of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, and the pre-existing regulation of telephone service providers under the Interstate Commerce Commission. See *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1100-1101 (7th Cir. 1983) (discussing history of federal telecommunications regulation). Moreover, the duty to interconnect under 47 U.S.C. § 251 extends to Cavalier and all other local exchange carriers, and not just to Verizon. It is market power, coupled with the refusal to interconnect for anticompetitive reasons, that sets Verizon's conduct apart from what the Fourth Circuit depreciated as "simple failures in the performance of duties set forth in [an] interconnection agreement." *Cavalier*, 330 F.3d at 184.

Fourth, a rare common point among *Goldwasser*, *Trinko*, *Covad*, and the decision below is the recognition that ILECs like Verizon are not protected by explicit or implied immunity. See, *e.g.*, *Cavalier*, 330 F.3d at 186-87. In that respect, all of the decisions follow *MCI*'s discussion of explicit and implicit antitrust exemptions, such as the explicit exemption enacted by Congress for the local consolidation of telephone networks in the 1921 Willis-Graham Act. *MCI*, 708 F.2d at 1100. Despite the clear limits of both explicit and implicit immunity, the Fourth Circuit seems to believe that Congress intended to establish a "parallel but distinctly different" regulatory regime under the 1996 Act, such

that certain conduct is nonetheless effectively immunized from antitrust scrutiny. This reading of the 1996 Act is far too convoluted, for Congress knows how to grant explicit immunity when that is its intent, and all four appellate decisions denied the applicability of implicit immunity. Ironically, the Fourth Circuit has effectively immunized Verizon's conduct by applying a tortured reading of the savings clause that was intended to leave that conduct subject to antitrust challenges. The savings clause in the avowedly pro-competitive 1996 Act should not provide the justification for former monopolists to willfully exclude competition by violating the newly enacted provisions of the 1996 Act itself.

Fifth, the issue of antitrust immunity illustrates the overly facile nature of the Goldwasser argument. If the aims of the antitrust laws and the 1996 Act are uniformly pro-competitive such that the statutes suffer from no "plain repugnancy," then it simply stands to reason that violation of the 1996 Act could be evidence of exclusionary conduct that violates the antitrust laws. Conversely, it makes no sense to conclude that violating a pro-competitive law means that exclusionary conduct is somehow precluded from antitrust scrutiny. It was thus disingenuous for the Seventh Circuit to comment that a firm in another market might violate laws that "have little or nothing to do with its position in the market" and not thereby violate the antitrust laws. *Goldwasser*, 222 F.3d at 400. That much is obvious—it is the 1996 Act's focus on competition that makes violation of its provisions relevant to the issue of exclusionary conduct by a former monopolist. The "safety or cleanliness standards" to which the Seventh Circuit alluded in

Goldwasser, would likely not be remotely as probative of anticompetitive intent. The Second Circuit recognized that, noting that "if the defendant's conduct did violate the antitrust laws, the fact that the regulatory commission also condemned the conduct of the defendant may indicate that the purposes of the two schemes are in synch, reinforcing our conclusion that there is no 'plain repugnancy' between the statutes." *Trinko*, 305 F.3d at 112. This Court should adopt the more well-reasoned approach in *Trinko*.

Sixth, the Fourth Circuit's decision below, like *Goldwasser*, extends beyond the scope of a motion to dismiss under Rule 12(b)(6). As the Eleventh Circuit repeatedly emphasized in *Covad*, factual issues should not be peremptorily decided on a motion to dismiss. See, *e.g.*, *Covad*, 299 F.3d at 1286 (factual issues involving essential facilities claim "must be addressed at a later state of the proceedings, such as summary judgment or trial"). The Seventh Circuit seemed too concerned about opening the litigation floodgates, with its comment that "the 1996 Act could be brushed aside by any unsatisfied party" who pursued "the simple act of filing an antitrust action." *Goldwasser*, 222 F.3d at 401. An antitrust action like that brought by Cavalier is not undertaken lightly, and it must be pursued through factual and expert testimony, motion practice, and trial by jury, before the remedy of treble damages is applied. An antitrust plaintiff must venture well beyond alleging the violation of duties that could be equated to the failed performance of obligations under the 1996 Act, to claim and prove anticompetitive intent and effects. That effort should not face premature ouster on a motion to dismiss.

Seventh, specific theories of antitrust liability will involve factual issues like one glossed over by the Seventh Circuit's casual comment that competitors "would have had the burden of duplicating [an ILEC's] physical infrastructure or of persuading the ILEC to contract with it on mutually satisfactory terms" absent passage of the 1996 Act. *Goldwasser*, 222 F.3d at 399. The dismissal of Cavalier's claims prevented discussion of the interconnection agreement voluntarily signed by both Cavalier and Verizon. It also prevented discussion of whether it is feasible or even desirable to duplicate the last-mile facilities that were at the core of Cavalier's essential facilities claim (Compl. ¶¶ 39-47, App. 74-75), in terms of stringing multiple fiber and copper lines throughout every neighborhood and business district. That same issue was also at the heart of the essential facilities claim approved twenty years ago by the Seventh Circuit in *MCI*, 783 F.2d 1081. The approach adopted in *Goldwasser* and *Cavalier* pretermits discovery and evidence concerning such factual issues; the approach adopted in *Trinko* and *Covad* properly allows for such inquiries. This Court should decide the issue along the same lines as in *Trinko* and *Covad*.

Finally, the scope and terms of the antitrust statutes are for Congress, not the Courts of Appeals, to decide. Such was the Seventh Circuit's conclusion in *MCI*, in terms that are still valid today:

> We acknowledge with approval the populist origins of the antitrust laws as well as the preeminent role of the Sherman Act as a charter of economic freedom. But we also believe that, as we have pointed out, larger concerns about broad pro-competitive policy, economic concentration and political power have been, and are being at this very moment, effectively addressed by the regulators, and possibly by the Congress. Hence, we have tended to believe it appropriate to focus at this time and in this case upon the specific issues of economic efficiency and consumer benefit which are directly presented. Thus, our resolution of the allegations of ... unlawful failure to interconnect ... to ... local distribution facilities has centered on the questions whether prices cover costs and whether the denied facilities are essential. We are, of course, not insensitive to broader social and political issues, but as indicated, we think that our principal task is to deal in depth with the specific questions presented.
>
> *MCI*, 708 F.2d at 1110-1111 (7th Cir. 1983).

The Second and Eleventh Circuits reached the same conclusion in *Trinko* and *Covad*, and simply assessed the validity of the claims brought by the plaintiffs in those cases. The Fourth and Seventh Circuits chose to depart from the Seventh Circuit's own prior decision in *MCI*, and replaced analysis under

Rule 12(b)(6) and more than a century of antitrust precedent with speculation about the interaction between two statutes—even though Congress had not directed the courts to engage in any such exercise. For this reason, and for the other reasons outlined above, Cavalier respectfully urges this Court to reject the rule adopted by the Fourth Circuit below, and instead to follow the approach taken in *MCI*, *Trinko*, and *Covad*.

CONCLUSION

The Court should hold the petition and, if the *Trinko* decision does not resolve the question presented, grant certiorari.

Respectfully submitted,

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August 18, 2003

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CAVALIER TELEPHONE, LLC,
Plaintiff-Appellant,

v. No. 02-1337

VERIZON VIRGINIA, INCORPORATED,
Defendant-Appellee,

INTEGRITY TELECONTENT,
Movant.

COVAD COMMUNICATIONS COMPANY; AT&T CORPORATION;
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES,
Amici Supporting Appellant.

UNITED STATES TELECOM ASSOCIATION;
BELLSOUTH CORPORATION; SBC COMMUNICATIONS, INCORPORATED,
Amici Supporting Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-01-736-3)

Argued: January 23, 2003
Decided: May 20, 2003
[Entered: May 20, 2003]

Before WIDENER and NIEMEYER, Circuit Judges, and Morton I. GREENBERG, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener joined. Senior Judge Greenberg wrote a dissenting opinion.

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OPINION

NIEMEYER, Circuit Judge:

This appeal presents the question of whether the allegations of the complaint in this case, which state ostensible violations of §§ 251 and 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.*), state a claim of a monopolization violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

Cavalier Telephone, LLC ("Cavalier") entered the local telecommunications service business pursuant to an interconnection agreement with Verizon Virginia, Incorporated ("Verizon"), an incumbent provider of telecommunications services in central and northeastern Virginia. The agreement made Verizon's lines and facilities available for use by Cavalier, as mandated by the Telecommunications Act. Problems in the implementation of the interconnection agreement, which Cavalier contends were deliberately created by Verizon to exclude Cavalier as a competitor, prompted Cavalier to file this action, alleging, among other things, that Verizon monopolized or attempted to monopolize the relevant telecommunications market, in violation of § 2 of the Sherman Act.

The district court granted Verizon's motion to dismiss the antitrust claims under Federal Rule of Civil Procedure 12(b)(6), concluding that Cavalier's allegations "merely represent violations of the 1996 [Telecommunications] Act dressed up in antitrust garb." For the reasons that follow, we affirm.

I

The facts for purposes of this appeal are those alleged in Cavalier's complaint, which we take to be true in deciding whether Cavalier stated a claim under § 2 of the Sherman Act upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 217-18 (4th Cir. 1994). Cavalier, a corporation whose principal place of business is in Richmond, Virginia, was formed in 1998 to enter into the business of providing basic telecommunications services to customers in the

Richmond, Tidewater, and Northern Virginia areas. Cavalier defines basic telecommunications services to include traditional local telephone service, dial-up Internet access, digital subscriber line (DSL) services, high-capacity voice and data services, voice mail, access to long-distance services, and any other service that could be provided over copper wire and fiber-optic cable linking consumers with the office of a service provider. This portion of a copper wire or fiberoptic network that takes telecommunications services into individual homes and businesses is commonly referred to as the "last mile" of facilities.

Until 1996, the predecessor of Verizon, a company also located in Richmond, was the telecommunications franchisee in the Richmond, Tidewater, and Northern Virginia areas that had been regulated by the Commonwealth of Virginia as a natural monopoly. Verizon owns the last-mile wire and cable facilities in its service area.

In 1996, Congress enacted the Telecommunications Act of 1996 (the "Telecommunications Act" or the "1996 Act") to promote competition in local telecommunications markets. The 1996 Act opens local telecommunications services to competition and requires existing telecommunications service providers, referred to in the Act as incumbent local exchange carriers ("ILECs"), to enter into interconnection agreements that make their facilities available to new entrants in the market, often referred to as competing local exchange carriers ("CLECs"), such as Cavalier. Also in 1996, Virginia lifted its ban on competition in local telecommunications markets, authorizing the State

Corporation Commission to grant certificates to applicants proposing to furnish local exchange telephone service in the service territory of another certificate holder. Va. Code § 56-265.4:4.C. The Virginia State Corporation Commission, however, retained continuing supervision over the services provided by existing and competing carriers.

Acting under the authority of the Telecommunications Act, Cavalier leased telecommunications facilities from Verizon by entering into a comprehensive interconnection agreement with Verizon's predecessor dated January 13, 1999, that was approved by the Virginia State Corporation Commission. The interconnection agreement states that Verizon "has undertaken to make such terms and conditions available to Cavalier hereby only because of and, to the extent required by, Section 252(i) of the [Telecommunications] Act," which required Verizon to make interconnections, services, and network elements available to Cavalier to the same extent as provided to another party through another interconnection agreement pursuant to the Telecommunications Act. Through the interconnection agreement, Verizon agreed (1) to resell its telecommunications services to Cavalier; (2) to lease and make available trunks to permit Cavalier to interconnect with Verizon's operations; (3) to allow access to Verizon's network elements; (4) to participate in "collocation," i.e., allowing Cavalier to have a location in Verizon's central offices to house Cavalier's equipment; (5) to allow access to Verizon's equipment; and (6) to facilitate telephone number portability. The agreement also governed the process by which Verizon was to bill Cavalier and made provision for the resolution of disputes.

As enabled by the interconnection agreement, Cavalier acquired customers in the Richmond, Tidewater, and Northern Virginia areas, and by the fall of 2001, it provided services to customers over approximately 100,000 telephone lines through its access to facilities owned by Verizon.

Shortly after the interconnection agreement was approved by the State Corporation Commission, problems in implementation of the agreement developed between Cavalier and Verizon. According to Verizon, after July 2000, Cavalier did not pay "one cent for those lines or for listing services that Verizon has provided, and now owes Verizon approximately $17 million." Verizon acknowledges that some of that amount was disputed but that over $9 million was undisputed. It asserts that even with respect to the $9 million amount due, Cavalier's president "refused to allow any money to be paid to Verizon because doing so would reduce Cavalier's `leverage' in negotiating with Verizon."

But Cavalier's complaint filed in this case, which we must accept as true at this stage, describes a significantly different and larger problem that developed between the parties.

First, Cavalier alleges that Verizon erected obstacles to Cavalier's interconnection with Verizon's network "by delaying the provision of trunks [communication lines linking Cavalier's and Verizon's systems] required for Cavalier to compete and by not establishing adequate trunks to carry telephone traffic between Cavalier's customers and Verizon's customers." Cavalier asserts that the inadequate

trunking blocked between 25% and 70% of calls intended for Cavalier's customers and caused "a complete outage for Cavalier in northern Virginia."

Second, as to collocation, Cavalier alleges that Verizon "used its control over the central office to raise Cavalier's costs, delay competition, and blockade entry." Cavalier points to Verizon's initial decision to charge $400,000 for a 10-foot-by-10-foot area for "space preparation" and its subsequent decision to charge only $47,686.20, an amount Cavalier contends was still "far higher than comparable charges for the same space preparation in states such as Massachusetts and Rhode Island." Cavalier also alleges that Verizon delayed the provision of space, "forc[ing Cavalier] to wait over 600 days for space in some Verizon central offices," and that Verizon charged noncompetitive prices and imposed "arbitrary and unnecessarily complex and burdensome rules for collocation."

Third, as to Cavalier's ability to order facilities and services from Verizon, Cavalier complains that Verizon "made the process of identifying and ordering last-mile facilities excessively lengthy, complex, and expensive." Cavalier also alleges that Verizon's employees made misrepresentations to existing or potential customers of Cavalier after Cavalier requested customer service records from Verizon. In addition, Cavalier alleges that the methods Verizon provided for ordering last-mile facilities were inferior, stating that they were either "frequently slow or completely `down' for the entire day" or "[did] not function as well, or in the same manner as, the systems that Verizon itself uses."

Fourth, in the area of assignment of facilities, Cavalier alleges that, when Verizon assigned last-mile facilities to Cavalier, it used "systems and procedures that [were] intentionally flawed and unnecessarily complex, delay-ridden, and expensive." For example, Cavalier alleges that Verizon's database had "inaccuracies" that led Verizon to "refuse[ ] to connect facilities to a certain port that Verizon [said did] not exist or [was] already being used by another customer," even when such was not the case.

Fifth, as to Verizon's provision of its last-mile facilities, Cavalier alleges that Verizon used "systems and procedures that [were] flawed, overly complex, delay-ridden, and expensive." Cavalier claims that Verizon "refuse[d] to provide Cavalier with last-mile facilities on integrated digital loop carriers . . . which serve [d] almost 25% of Verizon's lines in Virginia." Integrated digital loop carriers were designed to eliminate steps in providing telecommunications services and thus yield significant savings in equipment and operations. Cavalier contends that Verizon's explanation that provision of the facilities was not "technically feasible" was unsupportable, given that other companies provide access to such last-mile facilities. Cavalier also claims that the facilities that Verizon provided "had a disproportionately high number of problems" and that Verizon "also imposed costs on Cavalier's existing or potential customers through the premature disconnection of customers who unexpectedly los[t] telephone service in the process of switching to Cavalier as their provider of Basic Telecommunications Services." In addition, Cavalier alleges harm from "Verizon's intentionally costly approach to both directory assistance and

directory publications." And Cavalier complains that Verizon's rates were anticompetitive, stating that Verizon "proposed to offer [last-mile facilities] services at a price lower than Cavalier's `retail' cost for high-capacity facilities, or at a price so low that Cavalier could not profitably offer such services if forced to obtain last-mile facilities at `retail' cost."

Sixth, Cavalier complains that Verizon "imposed an unnecessarily complex, lengthy, and expensive process for Cavalier to mount its fiber on Verizon's utility poles or to pull its fiber th[r]ough conduit systems owned by Verizon," delaying Cavalier's network building "as long as 250 days." Cavalier also complains that Verizon was "disingenuous[ ]" when it claimed that Cavalier's requested process for using Verizon's spare fiberoptic cable was not "technically feasible." Cavalier alleges that when Verizon did provide its spare cable, Cavalier experienced problems in that "Verizon interrupted all service to Cavalier's northern Virginia switch for a period of several hours."

And *seventh*, Cavalier complains of Verizon's "error-laden" bills. Cavalier alleges that Verizon's bills suffered from "application of the wrong rate elements and non-compliance with conditions imposed by the [Merger Order between Bell Atlantic Corporation and GTE Corporation forming Verizon]." Cavalier complains that Verizon's billing "burdened Cavalier with voluminous paper bills that Verizon refuse[d] to provide in electronic format, [leaving] Cavalier unaware of how much it truly owe[d] and thus unable to plan its financing reliably, and serv[ing] as a pretense for Verizon to deny and threaten to deny the continued provision of services."

The complaint asserts that Verizon served approximately 90% of the relevant market – i.e., local telecommunications service in the Richmond, Tidewater, and Northern Virginia geographical areas – and that through the seven categories of activities alleged in the complaint, Verizon monopolized or attempted to monopolize the relevant market, in violation of § 2 of the Sherman Act and the analogous Virginia statute:

> Verizon has attempted to, and has, maintained its monopoly power in the relevant product and geographic markets through a series of exclusionary acts, each of which is aimed at either reducing or eliminating Cavalier's ability to reach end users, or raising the costs to Cavalier of competing with Verizon.

The complaint also alleges that Verizon's activities violated the Lanham Act, the Communications Act of 1934, the Merger Order between Bell Atlantic Corporation and GTE Corporation forming Verizon as approved by the FCC, and the Uniform Trade Secrets Act. It also alleges that Verizon's conduct amounted to tortious interference with contract, tortious interference with prospective economic advantage, intentional or negligent misrepresentation, and breach of contract, all under Virginia law. Cavalier demanded $135 million in treble damages, $500 million in punitive damages, injunctive relief, and attorneys fees and costs.

Shortly after commencing this action, Cavalier filed a motion for a temporary restraining order and a preliminary injunction, which the district court denied. Verizon then filed a motion to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), which the district court granted by order dated March 27, 2002, relying on Rule 12(b)(6) to dismiss Cavalier's federal claims and Rule 12(b)(1) to dismiss its state-law claims. In disposing of the claims asserted under the Sherman Act and the analogous Virginia statute, the district court stated:

> It is evident that Cavalier is not asserting a monopolization claim under the Sherman Act, but rather is detailing alleged violations of duties imposed upon Verizon by the 1996 [Telecommunications] Act. Often the issue is not whether Verizon is providing the facility or service as directed by the 1996 Act, but whether Verizon is providing the facility or service to Cavalier in a manner that fits within the standard of reasonableness established by the 1996 Act. Regardless of whether such factual allegations have merit, they do not state a claim for monopolization.

From the district court's order, Cavalier filed this appeal, initially challenging all of the rulings made by the district court in dismissing the complaint. Prior to oral argument, however, Cavalier limited its appeal to the contention that its complaint states viable claims of monopolization and attempted monopolization

under federal and State law,* abandoning its appeal of all other issues. II Cavalier contends that when the district court found that Cavalier's allegations amounted to ostensible violations of the Telecommunications Act of 1996, it erred in failing to analyze whether the same allegations also stated claims under the Sherman Act, particularly when the court recognized that the antitrust claims were not precluded through any implied repeal of, or immunity from, the antitrust laws. Cavalier challenges as error the district court's conclusion that Cavalier "cannot state a claim under § 2 of the Sherman Act if it alleges violations of affirmative duties created by the 1996 Act." Cavalier maintains to the contrary that even if conduct violates the Telecommunications Act, it can also violate § 2 of the Sherman Act:

> [I]f Verizon's alleged conduct consisted of exclusionary acts sufficient to state a claim for violation of § 2 of the Sherman Act, and the 1996 [Telecommunications] Act also happens to regulate some (or even all) of that conduct, then that anticompetitive conduct would almost certainly also violate affirmative, procompetitive duties under the 1996 Act.

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* While Cavalier brought its monopolization and attempted monopolization claims under both federal and State antitrust laws, Va. Code § 59.1-9.6,-9.12, there does not seem to be any dispute between the parties that disposition under the federal law also justifies a similar disposition under the State statute. *See Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991) (noting that Virginia follows federal law on antitrust issues).

Cavalier maintains that the district court, by failing to recognize this, improperly immunized Verizon from antitrust liability based on the Telecommunications Act. When conducting the antitrust analysis, Cavalier states that it met its burden by alleging (1) a relevant market, (2) anticompetitive conduct by Verizon aimed at maintaining Verizon's "near-complete monopoly of that relevant market," and (3) anticompetitive effects that included driving or attempting to drive Cavalier out of business and depriving consumers of lower prices, better services, and innovation.

Verizon contends that the allegations of Cavalier's complaint set forth "only complaints about Verizon's implementation of its regulatory duties to help Cavalier," imposed by the Telecommunications Act. It asserts that without the 1996 Act, Cavalier could not demand such "affirmative-assistance duties." Verizon notes that under established antitrust principles, a lawful monopolist has no general duty to help its competitors, even though it can be prohibited from active, unjust impairment of a competitor's efforts to challenge the monopoly. Accordingly, it concludes that the affirmative-assistance duties set forth in the Telecommunications Act exist "outside the parameters of pre-existing antitrust law" and that alleged breaches of those duties, while ostensibly constituting violations of the Telecommunications Act, do not constitute violations of the Sherman Act.

The requirements for alleging a monopolization claim are well known. Section 2 of the Sherman Act provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several 10 States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C. § 2. The Clayton Act makes this provision enforceable by "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. To state a monopolization claim under § 2, a plaintiff must allege (1) that the defendant possesses monopoly power in the relevant market and (2) that the defendant willfully acquired or maintained that power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). Conduct that merely has the consequence of shutting out competition does not rise to the level of anticompetitive behavior subject to antitrust liability; the monopolist must have acted with the intent to prevent competitors from entering the market. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) (noting that intent is a necessary element of claims under § 2); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973) ("Use of monopoly power `to destroy threatened competition' is a violation of the `attempt to monopolize' clause of § 2 of the Sherman Act").

Cavalier's complaint, contending that Verizon, as a monopolist, deliberately attempted to exclude Cavalier from the relevant market, does conclusorily

allege all of the required elements of a monopolization claim under § 2 of the Sherman Act. But the breaches of duties on which those allegations depend and which the complaint attributes to Verizon require us to determine, by looking at the complaint in its entirety, whether the complaint's allegations advance a legal theory on which antitrust relief can be granted. *See* Fed. R. Civ. P. 12(b)(6); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 401 (7th Cir. 2000).

Both parties recognize that Cavalier's allegations state breaches of duties imposed by the Telecommunications Act and by the interconnection agreement. That Act required Verizon to surrender its theretofore legal monopoly and to lease its facilities to carriers such as Cavalier who wished to compete in the market. Accordingly, Cavalier entered into competition with Verizon by entering into an interconnection agreement with it as mandated by the Telecommunications 11 Act. *All* of the untoward conduct attributed to Verizon in the complaint arises from duties imposed on Verizon by the Telecommunications Act. Thus, for example, Cavalier alleges that Verizon delayed the provision of trunk lines, provided inadequate trunk lines, charged Cavalier too much for collocation, delayed the provision of collocation space and made collocation arrangements unnecessarily complex, made procedures for obtaining last-mile facilities overly complex, which delayed Cavalier's access to such facilities, provided inferior facilities, delayed Cavalier's network building, and submitted overly complex and even erroneous bills to Cavalier. All of these alleged failures are failures in the performance of duties set forth in the interconnection agreement, and, as that

agreement provides, Verizon would not have entered into such an agreement except as required by the Telecommunications Act.

Cavalier alleges that the motives behind Verizon's breaches of its duties under the 1996 Act were to exclude Cavalier as a competitor and to preserve the monopoly that Verizon had enjoyed before 1996, in violation of the Sherman Act. To determine whether these allegations are sufficient to state an antitrust claim, it is necessary to review the role and scope of the Telecommunications Act and its special relationship to the Sherman Act.

The Telecommunications Act amended the Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified at 47 U.S.C. § 151 *et seq.*). Even before the enactment of the Communications Act of 1934, Verizon's ancestor, the American Telephone and Telegraph Company ("AT&T"), operated as a natural monopoly. By 1934, AT&T owned 80% of the local telephone lines and services in the United States. *Goldwasser*, 222 F.3d at 392. When Congress passed the Communications Act in 1934, it established the Federal Communications Commission ("FCC") and imposed a scheme that divided regulation of AT&T and others on the basis of intrastate and interstate services. The Communications Act vested the FCC with authority previously exercised by the Interstate Commerce Commission over *interstate* matters and left *intrastate* matters to State public utility commissions. 47 U.S.C. § 152 (granting the FCC authority to regulate "interstate and foreign communication by wire or radio" but preventing it from regulating "intrastate communication service"); *see also Bell Atlantic Md., Inc.*

v. MCI WorldCom, Inc., 240 F.3d 279, 299 (4th Cir. 2001), 12 *vacated on other grounds sub nom. Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635 (2002). The Communications Act, however, did not break up the natural monopoly held by AT&T through its "Bell System." Rather, it regulated AT&T in its interstate services by requiring it to provide services at "just and reasonable" rates. 47 U.S.C. § 201. The Act permitted duplication of services and competition only when "public convenience and necessity require[d]" it. *Id.* § 214(a).

Following a lawsuit commenced by the United States against AT&T, which alleged that AT&T violated the antitrust laws, Judge Harold Greene of the United States District Court for the District of Columbia approved a settlement in 1982 through a consent decree that broke up AT&T and required it to divest itself of, among other things, the Bell operating companies that were providing local services. *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982). By then, AT&T had become the largest corporation in the world "by any reckoning." *Id.* at 151-52. Under the consent decree, "long-distance service" or interstate service was opened up to competition, but local service remained in the hands of regional Bell operating companies subject to regulation as natural monopolies by State utility commissions.

The government's suit against AT&T was legitimized by Judge Greene's rulings that anticompetitive conduct attributed to AT&T in both interstate and local markets was not immunized or protected by either the Communications Act of 1934 or by State law except to the extent that those laws

expressly authorized and pervasively regulated the anticompetitive conduct. *See id.* at 154-59; *United States v. AT&T*, 461 F. Supp. 1314, 1320-24 (D.D.C. 1978). Finding nothing to that effect in either the Communications Act or State law as to AT&T's *interstate* conduct, Judge Greene permitted the government to proceed on its Sherman Act claims against AT&T. But the companies, including Verizon, that were spun off as the product of AT&T's break-up were permitted to continue to operate in local markets under monopoly franchises conferred by State utility commissions, and they were not subject to the antitrust laws regarding their regulated conduct.

That all changed with the enactment of the Telecommunications Act of 1996 and with Virginia's repeal of its monopoly grant to Verizon earlier the same year. With the passage of the Telecommunications Act, Congress made local-services markets open to competition as had been the case for long-distance services pursuant to the AT&T consent decree. The stated purpose of the Act was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). Congress sought to "provide for a procompetitive, de-regulatory national policy framework designed *to accelerate* rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996); S. Conf. Rep. No. 104-230, at 1 (1996) (emphasis added).

To further its local-competition goal, the Telecommunications Act imposes duties on incumbent local exchange carriers or ILECs to provide access to their facilities and equipment to competing carriers. 47 U.S.C. § 251. More particularly, in § 251(a) and (b), the 1996 Act imposes on every telecommunications carrier an affirmative duty to interconnect with other carriers, to follow stated rules regarding resale, and to provide nondiscriminatory access to telephone numbers and operator services, telephone poles, ducts, conduits, and rights-ofway. *Id.* § 251(a), (b). Under § 251(c), the incumbent local exchange carrier bears additional duties, including the duty to negotiate interconnection agreements with any new carrier so requesting, to provide access to its network elements on an unbundled basis, to offer its retail telecommunications services for resale at wholesale rates, and to provide for collocation. *Id.* § 251(c). Section 252 governs negotiation and arbitration of interconnection agreements. *Id.* § 252. Agreements voluntarily made may be entered into without regard to the specific duties imposed by § 251(b) and (c). Section 252 identifies the procedure for agreements reached through mandatory arbitration, which are not exempted from the requirements outlined in § 251. In short, §§ 251 and 252 of the 1996 Act imposed commands on incumbent local exchange carriers to interconnect with and assist new would-be competitors — obligations that telecommunications carriers did not previously have and would not have had under a free-market regime. Within two years after the 1996 Act's enactment, approximately 5,400 agreements were reached under § 252. *See* United States Telephone Association, Competition in the Local Loop, *at* http://www.usta.org/blileyft.html (Dec. 10, 1998).

Through the Telecommunications Act, Congress also substantially altered oversight responsibility previously exercised by the FCC and by State commissions. Compared to its authority under the Communications Act of 1934, the FCC was given a much stronger role under the 1996 Act in regulating the telecommunications industry. Its new role also released the District of Columbia District Court from oversight responsibilities under the 1982 consent decree. And although States continue to play an important role in local markets, the FCC has the responsibility of coordinating the national telecommunications market and thus is given the authority to control a significant part of the telecommunications scheme. In furtherance of the new role of the FCC, the Telecommunications Act granted the FCC authority, after notice and comment, to preempt the laws of any States that prohibited competition in local telecommunications services markets, bringing under federal control much of the transition from regulated local monopolies to free-market industry. *See* 47 U.S.C. § 253(d).

Thus, although "deregulatory in tone," the 1996 Act is nonetheless still "regulatory in effect." Peter W. Huber et al., *Federal Telecommunications Law* 210 (2d ed. 1999). Congress "broadly extended its law into the field of intrastate telecommunications," even though in a few areas such as interconnection agreements, it left control with State regulatory commissions rather than subjecting the field to complete federal control or releasing the industry to the invisible hand of the free market. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 n.10 (1999). Although the 1996 Act removed "pillars of traditional regulation" associated with protected

monopolies, the Act imposes other requirements – "some 100 pages of impenetrably dense and convoluted prose" – to transition the industry from monopolies to competition. *See* Huber et al., *supra*, at 53-54. "The sheer volume of regulation has increased dramatically," placing the industry "at the high-water mark of regulation." *Id.* at 1, 5.

Consistent with its pro-competitive purpose and with the findings made by Judge Greene about the applicability of the antitrust laws to AT&T, the Telecommunications Act provides that telecommunications companies continue to be subject to the antitrust laws:

> [N]othing in this Act or the amendments made by this Act, shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

§ 601(b)(1), 110 Stat. at 143 (codified at 47 U.S.C. § 152 note). In a similar vein, the general savings clause states that "this Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." *Id.* § 601(c)(1). Consistent with these provisions, the FCC explained in adopting regulations implementing §§ 251 and 252 of the 1996 Act that "nothing in sections 251 or 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 at ¶ 129.

The parties to this case do not dispute the general principle that they are subject both to the regulation of the Telecommunications Act and to the applicable principles of existing antitrust laws. *See Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 305 F.3d 89, 109 (2d Cir. 2002) ("The savings clause unambiguously establishes that there is no `plain repugnancy' between the Telecommunications Act and the antitrust statutes"), *cert. granted*, 71 U.S.L.W. 3571-72 (Mar. 10, 2003) (No. 02-682); *Covad Communications Co. v. Bell-South Corp.*, 299 F.3d 1272, 1280 (11th Cir. 2002) ("It is clear that plain repugnancy cannot be found between the 1996 Act and the antitrust laws in view of the 1996 Act's express language reserving the applicability of the antitrust laws"); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 401 (7th Cir. 2000) ("Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law. Such a conclusion would be troublesome at best given the antitrust savings clause in the statute"). But simply noting the conclusion that companies subject to regulation under the Telecommunications Act are not thereby immunized from the antitrust laws does not address the special relationship between the laws that is necessary to understand in order to resolve the issue presented in this case – whether the particular allegations in Cavalier's complaint state a monopolization claim when that claim is based on duties imposed by the Telecommunications Act. Stated otherwise, while the provisions of the Telecommunications Act do not limit the applicability of the antitrust laws to Verizon, we must still determine whether violations of §§ 251 and 252 of the Telecommunications Act as alleged in the

complaint before us support a claim under the antitrust laws.

We begin the analysis by noting that the process for fostering competition changed dramatically with the enactment of the Telecommunications Act. We observe that even though the antitrust laws' applicability is preserved and their purpose of promoting competition is similar to the Telecommunications Act's purpose of creating competition in local telecommunications markets, Congress adopted independent methods for giving effect to the two laws' purposes, and the difference in those methods is material to reaching the appropriate disposition of this case.

When enacting the Telecommunications Act, Congress could well have elected to rely only on the antitrust laws to create competition in local telecommunications markets by simply implementing the Supremacy Clause to preempt State laws that granted exclusive franchises in local markets. But foreseeing the inefficiency of that approach, Congress opted to take the proactive approach of creating new duties under the Telecommunications Act. By "jump-starting" and "accelerating" the creation of competition in the local markets through enactment of §§ 251 and 252 of the Telecommunications Act, Congress imposed more dramatic obligations on the local monopolies than would have been imposed simply by subjecting them to preexisting antitrust liability. This was necessary because the antitrust laws alone do not require legitimate monopolies to give up their monopolies or to help competitors. Even under the essential facilities doctrine applied in *Otter Tail*, 410

U.S. 366, a legal monopoly cannot be forced to get into a business it was not traditionally in simply to respond favorably to a new competitor's demand for use of its facilities. In *Otter Tail*, the utility *was* in the business of wheeling power and selling electricity at wholesale, and its refusal to engage in such business with municipalities that posed a competitive threat to the utility was found to be an improper maintenance of monopoly power. *Id.* at 370, 377-79. But if a company such as Verizon, which was a longstanding legal monopoly, were asked to share its office space and to rent its telephone lines and other facilities to a competitor when it was not already in the business of renting office space, lines, or facilities, it could have legally refused the request to expand into such a business without violating § 2 of the Sherman Act. *See Goldwasser*, 222 F.3d at 400 ("These are precisely the kinds of affirmative duties to help one's competitors that we have already noted do not exist under unadorned antitrust laws"); *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 929 (4th Cir. 1990) (observing that a lawful monopolist generally has no duty to help its competitors).

Once it is recognized that the creation of competition in local markets through enforcement of the antitrust laws could be slow and inefficient, then Congress' adoption of the Telecommunications Act as a parallel but distinctly different approach to jump-start and accelerate competition can be understood. As a leading backer of the Telecommunications Act in the Senate stated, the enactment of the Telecommunications Act "is kind of almost a jump-start . . . this legislation says you will not control much of anything. You will have to allow for

nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 488 (2002) (quoting the remarks of Senator Breaux, 141 Cong. Rec. 15572 (1995)); *see also Goldwasser*, 222 F.3d at 399 ("[I]n an effort to jump-start the development of competitive local markets, [Congress] imposed a host of special duties on [incumbent local exchange carriers]"). And similarly, the Conference Reports explained that enactment of the Telecommunications Act was intended to "accelerate" competition in local markets. *See* H.R. Conf. Rep. No. 104-458, at 1; S. Conf. Rep. No. 104-230, at 1.

In furtherance of its intent to jump-start or accelerate competition in local markets through means independent of the antitrust laws, Congress enacted §§ 251 and 252 of the Telecommunications Act to impose *entirely* new duties, which were in addition to the duties imposed by § 2 of the Sherman Act. *See Verizon Communications*, 535 U.S. at 528 ("The wholesale market for leasing network elements is something brand new" under the Telecommunications Act). Under 18 §§ 251 and 252 of the Telecommunications Act, an incumbent telecommunications carrier must assist a competitor's entry into the market by entering into an interconnection agreement, reselling service, and making facilities available. *See* 47 U.S.C. § 251(c); *Verizon Communications, Inc.*, 535 U.S. at 491-92. These obligations exceed the duties imposed by the antitrust laws, and failure to fulfill them would not have supplied the foundations of a monopoly claim. *See Goldwasser*, 222 F.3d at 400 ("A complaint like this one,

which takes the form `X is a monopolist; X didn't help its competitors enter the market so that they could challenge its monopoly; the prices I must pay X are therefore still too high' does not state a claim under Section 2"). Moreover, even though duties imposed by law might serve to support a monopoly claim where the duties were violated with anticompetitive intent, we conclude, as explained below, that the special, indeed idiosyncratic, relationship between the Telecommunications Act and the Sherman Act prevents the Sherman Act from taking on the role of enforcing duties imposed for the first time by the Telecommunications Act.

That it was Congress' design to rely on the Telecommunications Act and the Sherman Act enforced independently is revealed in two ways. First, the Telecommunications Act stated explicitly that even though antitrust laws would remain applicable, the Telecommunications Act was not altering preexisting antitrust laws. *See* § 601(b)(1), 110 Stat. at 143 ("[N]othing in this Act . . . shall be construed to *modify*, impair, or supersede the applicability of any of the antitrust laws") (emphasis added). This may be understood to mean that just as Congress did not intend that the Telecommunications Act would immunize conduct illegal under the antitrust laws, it also did not intend to have the duties imposed by the Telecommunications Act modify or expand the scope of the Sherman Act. Legislative history confirms this concept that the Telecommunications Act was intended to preserve the role of the antitrust laws as they stood at the time of the 1996 Act's enactment. *See, e.g.*, 142 Cong. Rec. S687 (daily ed. Feb. 1, 1996) (statement of Sen. Pressler) ("This bill does not affect our antitrust

laws. The antitrust laws stay in place"); 141 Cong. Rec. S8154 (daily ed. June 12, 1995) (statement of Sen. Hollings) ("Section 2 of the Sherman Antitrust Act is untouched, absolutely untouched"); 141 Cong. Rec. S8152 (daily ed. June 12, 1995) (statement of Sen. Breaux) ("No one can say that this bill somehow guts the Department of Justice's role in enforcing antitrust laws, because it makes no changes in that"). Thus, it appears that Congress wished to have both acts further competition in local telecommunications services markets through *independent* means. Stated otherwise, Congress intended that even as it imposed new duties through enactment of the Telecommunications Act that would fall outside the parameters of the antitrust laws, it intended that the duties imposed by the antitrust laws would be left "untouched.

"Second, the procedures and remedies used to enforce each law are distinct. The Telecommunications Act provides for State regulatory commission approval of interconnection agreements and ongoing supervision of the obligations imposed by the agreements. *See Bell Atlantic Md.*, 240 F.3d at 299-301. If Congress did not intend to rely on those procedures independently, it would not have inserted the entirely new scheme of §§ 251 and 252. It would have simply relied on the antitrust laws' enforcement in federal district courts under the Clayton Act, which authorizes treble damages and attorneys fees to private litigants. *See* 15 U.S.C. § 15. Instead, in enacting the Telecommunications Act, Congress was imposing new duties precisely focused to break up local monopolies, and its selection of duties, coupled with the remedial procedures of the Telecommunications Act, was to be in addition to duties imposed and remedies afforded

by the Sherman Act. *See Goldwasser*, 222 F.3d at 400 ("The 1996 Act in fact has an elaborate enforcement structure that Congress created for purposes of managing the transition from the former regulated world to the hoped-for competitive markets of the future").

We must remain clear, however, that even as we conclude that the Telecommunications Act and the Sherman Act impose independently enforceable duties, we do not conclude that every complaint that states violations of §§ 251 and 252 of the Telecommunications Act cannot for that reason alone also state a claim for violations of the Sherman Act. In circumstances where facts state a claim under both statutes construed independently of each other, they may give rise to relief under each act.

Moreover, our rationale should not be taken so broadly as to preclude a monopolization claim built on conduct made illegal by statutes other than the Telecommunications Act. Rather, we conclude only that a natural monopolist's legal refusal to deal is not made an illegal refusal to deal under the antitrust laws when Congress requires the monopolist to deal with competitors through duties imposed by the Telecommunications Act. The special relationship between the Telecommunications Act and the antitrust laws, acting in parallel but through distinct schemes to promote the general goal of competition, supports this conclusion.

Were we to conclude otherwise, every violation of §§ 251 and 252 of the Telecommunications Act could be asserted as a violation of the Sherman Act merely by

alleging that the conduct was undertaken with an intent to monopolize, and the intent element would be supplied by noting that the defendant simply resisted compliance with the Telecommunications Act, which is aimed at breaking up monopolies. In such a case, the procedures and remedies specified by Congress for violations of the Telecommunications Act would become subservient to, indeed overrun by, the Sherman Act. This result would be directly contrary to Congress' choice of furthering competition through newly crafted affirmative duties and procedures, which were in addition to and beyond the duties imposed under § 2 of the Sherman Act. Enforcement under the Sherman Act would effectively collapse enforcement of the Telecommunications Act, leaving only one effective means — the treble-damages suit.

For all of these reasons, we conclude that the Sherman Act continues to apply in its own traditional domain, applying as it did before the Telecommunications Act, and the Telecommunications Act imposes new duties that may be enforced in accordance with its own provisions but not under the Sherman Act unless the conduct otherwise would have supported a claim under the Sherman Act absent the authority of the Telecommunications Act. *See Goldwasser*, 222 F.3d at 401. *But see Trinko*, 305 F.3d at 107-13 (permitting antitrust claims to proceed by applying general antitrust principles); *Covad*, 299 F.3d at 1285-92 (same).

Thus, when we focus on the conduct alleged by Cavalier in the complaint before us to determine whether it amounts to breaches of duties imposed for the first time and only by the Telecommunications Act,

we conclude that the conduct alleged would not, independent of the Telecommunications Act, violate duties imposed under the Sherman Act. When Virginia lifted its ban on competition in the local telecommunications industry, Verizon would not have been obligated to rent its facilities and provide access to its elements to competitors to enable them to enter the market, and a complaint that alleges that it had a duty to do so under the antitrust laws would fail to state a claim upon which relief could be granted. Although the Telecommunications Act did impose these obligations on Verizon, Cavalier's recourse is to the procedures and remedies afforded by the Telecommunications Act, not to those afforded by the antitrust laws.

Because we find that Cavalier's complaint alleges only breaches of duties that did not exist prior to the enactment of the Telecommunications Act and would not have supported a claim of monopolization or attempted monopolization, it has failed to state a claim under § 2 of the Sherman Act, and the State analogue, upon which relief can be granted. We therefore hold that the district court properly granted Verizon's motion to dismiss this action pursuant to Rule 12(b)(6), and we affirm the judgment of the district court.

AFFIRMED

GREENBERG, Senior Circuit Judge, dissenting:

As I would find that Cavalier's complaint adequately states a claim for relief under the essential facilities doctrine, I respectfully dissent.

As a preliminary matter, I point out that I agree wholeheartedly with the majority's analysis of the relationship between the Sherman Act and the Telecommunications Act. In particular, I support its conclusion that "the provisions of the Telecommunications Act do not limit the applicability of the antitrust laws to Verizon." Maj. Op. at 17. Furthermore, I agree both that "the special, indeed idiosyncratic, relationship between the Telecommunications Act and the Sherman Act prevents the Sherman Act from taking on the role of enforcing duties imposed for the first time by the Telecommunications Act," *id.* at 19, and that "[i]n circumstances where facts state a claim under both statutes construed independently of each other, they may give rise to the relief under each act," *id.* at 20.

I differ with the majority, therefore, only with regard to my understanding of how a complaint alleging violations of the Sherman Act under an essential facilities theory should be dealt with on a motion under Fed. R. Civ. P. 12(b)(6). I cannot agree with the assertion that "*[a]ll* of the untoward conduct attributed to Verizon in the complaint arises from duties imposed on Verizon by the Telecommunications Act." *Id.* at 12 (emphasis in original); *see also id.* at 17 ("[W]e must still determine whether *violations of §§ 251 and 252 of the Telecommunications Act as alleged in the complaint before us* support a claim under the antitrust laws.") (emphasis added). In my view, this reading of the complaint is too narrow given that a complaint should not be dismissed under Rule 12(b)(6) unless it appears certain that the plaintiff can prove no set of facts which would support its claim and entitle it to relief. *See, e.g., Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002).

The essential facilities doctrine is a narrow exception to the rule that a monopolist has no duty to deal with its competitors. *See Covad Communications Corp. v. Bell Atlantic Corp.*, 201 F. Supp. 2d 123, 131 (D.D.C. 2002) (citing *Olympia Equip. Leasing Co. v. W. Union Telegraph Co.*, 797 F.2d 370, 376 (7th Cir. 1986)). Although the doctrine certainly has its critics, *see, e.g.*, 3A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 771c (2d ed. 2002), there is no denying that it "has a long and respected history as part of U.S. antitrust law," Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 Antitrust L.J. 443, 445 (2002). To state an essential facilities claim, a plaintiff must allege: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150-51 (4th Cir. 1990) (citing *MCI Communications Corp. v. Am. Tel. & Telegraph Co.*, 709 F.2d 1081, 1132-33 (7th Cir. 1983)). As the Court of Appeals for the Eleventh Circuit summarized the doctrine, "[t]he `applicable legal standard' is that `[a]ny company which controls an `essential facility' or a `strategic bottleneck' in the market violates the antitrust laws if it fails to make access to that facility available to its competitors *on fair and reasonable terms* that do not disadvantage them.'" *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1287 (11th Cir. 2002) (quoting *United States v. AT&T*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981) (emphasis and second alteration in *Covad*)). This standard is necessarily factbound, and cases dismissing essential facilities claims accordingly

have been more common in motions for summary judgment contexts rather than in motions to dismiss contexts. *See id.* at 1287 n.13 (citing summary judgment cases); *see also Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir. 1991) (affirming summary judgment for defendant); Pitofsky et al., *supra*, at 450 ("Given the stringency of the widely-adopted requirements set forth in *MCI Communications*, U.S. courts rarely find liability under the essential facilities doctrine. But even courts rejecting application of the doctrine note that their analysis is highly fact-specific . . . .").

I believe that the complaint alleges facts that, when all inferences are drawn in favor of Cavalier, state a viable claim of monopolization under the essential facilities doctrine. In particular, I would follow the lead of the Courts of Appeals for the Second and Eleventh Circuits, which have held that essential facilities claims similar to those here should survive a motion to dismiss. In so holding, the Court of Appeals for the Second Circuit stated:

> [T]he amended complaint may state a claim under the "essential facilities" doctrine. The plaintiff alleges that access to the local loop is essential to competing in the local phone service market, and that creating independent facilities would be prohibitively expensive. The defendant allegedly has failed to provide its competitor . . . reasonable access to these facilities. . . . Although the defendant may ultimately be able to show that the local loop is not an

> essential facility, or that it provided the plaintiff with reasonable access to the local loop, these are issues that the district court should consider in the first instance.

Law Offices of Curtis v. Trinko, LLP v. Bell Atlantic Corp., 305 F.3d 89, 108 (2d Cir. 2002) (emphasis omitted), *cert. granted*, 123 S.Ct. 1480 (Mar. 10, 2003) (No. 02-682). The separate opinion in *Trinko* specifically emphasized "the extent to which . . . the procedural posture of the case may influence the outcome of this appeal." *Trinko*, 309 F.3d 71, 72 (2d Cir. 2002) (Sack, J., concurring in part and dissenting in part). The Court of Appeals for the Eleventh Circuit was even more explicit in rejecting an incumbent local exchange carrier's ("ILEC") factbound arguments for dismissal; indeed, it rejected arguments by the ILEC parallel to those advanced by Verizon here, noting that "these are arguments that must be addressed at a later stage of the proceedings, such as summary judgment or trial." *Covad*, 299 F.3d at 1286.[1] I believe that, in holding that the conduct alleged does not violate duties imposed under the Sherman Act, independent of those under the Telecommunications Act, because Verizon has no antitrust duty to rent

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[1] The ILEC in *Covad* advanced three main arguments: (1) that the competiting local exchange carrier ("CLEC") complained only about the terms or quality of access, but did not allege an actual denial of access to the essential facility; (2) that the CLEC sought "preferential access" to the local loop, which would require the ILEC to "abandon its facilities"; and (3) that the CLEC was attempting to force the ILEC to construct new facilities or alter the nature of its business and become a renter of facilities. *Covad*, 299 F.3d at 1286. Verizon makes precisely these same three arguments in this case, and the majority accepts the third as a basis for affirming the dismissal. Maj. Op. at 15.

facilities to its competitors, the majority has resolved questions of fact adversely to Cavalier. In particular, the majority's implicit holding is that because Verizon traditionally has been in the business of providing telecommunications services to consumers and not of renting facilities to competitors, it would have to alter the nature of its business to make its essential facilities available to Cavalier and that any degree of transformation of one's business is per se not feasible under the fourth prong of the *MCI* test.

I note that this is not a case like that posited in Verizon's brief, *see* Br. of Appellee at 32, or the identical argument made by BellSouth (and rejected by the court) in *Covad*, *see Covad*, 299 F.3d at 1286, however, where a competitor seeks to require the monopolist to "build new capacity to satisfy a would-be sharer," 3A Areeda & Hovenkamp, Antitrust Law ¶ 773e, at 210. In such a case, I would, perhaps, be more willing to say that, as a matter of law, providing access to the essential facility would not be feasible. Here, however, Cavalier alleges that Verizon refused to provide Cavalier *access to existing essential facilities*, namely, "last-mile" facilities like the local loop connecting individual homes and businesses to Verizon's central office, when it could have done so. Compl. at ¶¶ 21, 92, 93. Construing these allegations liberally in favor of Cavalier, we should assume that Verizon need do little more than sign leasing agreements covering those last-mile facilities implicated when Cavalier woos a new customer. If more burdensome steps are required, Verizon should proffer evidence to that effect, but it should do so as an aspect of the development of a factual record. Furthermore, Cavalier alleges that, where access to those facilities nominally was granted,

Verizon intentionally provided the access in a discriminatory way, for example, by providing a disproportionate number of nonfunctioning last-mile facilities to Cavalier customers, resulting in service interruptions that damaged Cavalier. *Id.* at ¶¶ 102-05. It alleges that Verizon knowingly took all of these steps with the intent to maintain its monopoly. Cavalier therefore has alleged a relatively straightforward violation of the essential facilities doctrine. It does not seek preferential access or ask that Verizon build new capacity, but rather asks that Verizon make available on reasonable terms the facilities Cavalier requires to be able to compete.

Admittedly, by reason of the historical fortuity that it until recently enjoyed a state-sponsored monopoly in the local services market, Verizon and its predecessors never have had occasion to get into the business of leasing access to such facilities.[2] In the majority's view, this point is conclusive. Under my understanding of the essential facilities doctrine, this fact is just one factor to consider in determining whether Verizon feasibly could have provided such access. Verizon very well may prove that it could not feasibly have provided the access sought by Cavalier without truly altering the nature of its business. *Cf. Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977) ("[The essential facilities doctrine] must be

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[2] I note that this "fact" has been discussed in the parties' briefs and effectively has been judicially noticed by the majority, despite the fact that it is not a part of the complaint or any other part of the record. That some evidence should be introduced to support the proposition that Verizon has never leased such facilities, at least since 1996, further justifies letting this case go forward so that a factual record may be developed.

carefully delimited: the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."). On the other hand, Cavalier may be able to show that, although Verizon has not been in the habit of leasing access to such facilities, the burden on Verizon of doing so would be so slight that it could not be said to be transforming its business by making those facilities available. In other words, Cavalier may be able to prove that Verizon failed to make lastmile facilities available to it on fair and reasonable terms even though doing so would have been perfectly feasible and would not have required Verizon to alter the nature of its business in any meaningful way.

Although competition now has replaced sanctioned monopoly in the industry, Verizon continues to have exclusive control of a facility crucial to such competition and, taking Cavalier's allegations as true and drawing all inferences in its favor, refuses to make those facilities available on fair and reasonable terms even though doing so would not be burdensome and would not require Verizon to transform its existing business in any meaningful way. I find no support in the caselaw for the conclusion that Cavalier could prove no set of facts consistent with its complaint to demonstrate that Verizon unreasonably denied access to such facilities where it feasibly could have provided it, even if Verizon never has leased such facilities in the past. Indeed, one of the leading essential facilities cases upheld a jury finding that AT&T, which was also, of course, in the business of providing telecommunications services, not of leasing facilities, denied MCI access to essential facilities (in fact, at least

in part the same type of essential facilities involved here, namely the interconnections between customers' residences and the monopolist's central facilities) where such access reasonably could have been provided. *MCI*, 708 F.2d at 1131-33. More importantly, when this court has held that an essential facilities claim could not succeed because providing access to the essential facility would have required the monopolist to alter its business, it has done so on summary judgment proceedings, after development of a factual record, considering the history of the business as part of the feasibility element. *See, e.g., Laurel Sand*, 924 F.2d at 545.

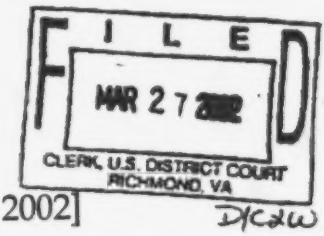
For these reasons, even though I largely agree with the majority opinion, I respectfully dissent as I would reverse the district court's judgment and remand this case to that court for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CAVALIER TELEPHONE, LLC
Plaintiff

v. Civil Action Number 3:01CV736

VERIZON VIRGINIA, Inc.
Defendant.



ORDER
[Entered: March 27, 2002]

THIS MATTER is before the Court on the Defendant's Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons discussed in the attached Memorandum Opinion, the Motion is GRANTED in FULL.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

MAR 27 2002
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CAVALIER TELEPHONE, LLC
Plaintiff

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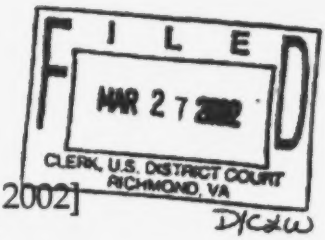

ORDER
[Entered: March 27, 2002]

MEMORANDUM OPINION

This matter is before the Court on Verizon Virginia's Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons discussed below, the Motion is granted in full.

I.

Cavalier Telephone ("Cavalier") competes with Verizon Virginia ("Verizon") in the basic telecommunications services market. Under the Telecommunications Act of 1996 ("the 1996 Act"), 47 U.S.C. § 151 et seq., incumbent local exchange carriers ("ILECs") like Verizon are required to provide certain facilities to competing local carriers, such as Cavalier, at cost-based rates. The 1996 Act contemplated the entry of other telecommunications companies like Cavalier into local markets, fostering competition in an area that had once been controlled by a regulated monopoly.

The 1996 Act imposes certain duties on ILECs. Among these obligations are a duty to provide interconnection, a duty to allow unbundled access to network elements, and a duty to provide collocation. Among the facilities that Verizon must supply to Cavalier are "last-mile" facilities or loops, which connect customers' premises to Verizon's central offices. Verizon's duties to Cavalier under the 1996 Act are contained in an Interconnection Agreement that the two parties executed in January 1999 and the State Corporation Commission ("SCC") approved in June 1999.

Cavalier filed suit against Verizon on November 1, 2001, enumerating 10 separate causes of action in its Complaint. These causes of action include several alleged violations of federal law, making federal jurisdiction proper. Specifically, Cavalier raises the following claims:

First Cause of Action: Monopolization;

Second Cause of Action: Attempted Monopolization;

Third Cause of Action: Violation of the Lanham Act;

Fourth Cause of Action: Violation of the Communications Act of 1934;

Fifth Cause of Action: Violation of the Merger Order;

Sixth Cause of Action: Violation of the Uniform Trade Secrets Act;

Seventh Cause of Action: Tortious Interference with Contract;

EighthCause of Action: Tortious Interference with Prospective Economic Advantage;

Ninth Cause of Action: Intentional or Negligent Misrepresentation; and

Tenth Cause of Action: Breach of Contract in Regard to the Interconnection Agreement.

To support these causes of action, Cavalier alleges numerous factual incidents of anti-competitive behavior on the part of Verizon. These include claims that Verizon took steps to delay Cavalier's entry into the market, that Verizon mis-routed Cavalier's calls, that Verizon supplied Cavalier with an inferior Web interface for use in ordering loops, that Verizon refused to supply loops on integrated digital loop carriers, that Verizon manipulated charges, that Verizon attempted to delay Cavalier's efforts to build fiber-optic networks, and that Verizon intentionally made the billing process for loops costly for its competitors.

Cavalier requested a temporary restraining order and a preliminary injunction to prevent Verizon from taking certain actions, but the Court, in a November 21, 2001 Order, denied Cavalier's motion. Verizon then brought this Motion to Dismiss.

II.

Verizon attacks each of Cavalier's federal law claims, asking the Court to dismiss each one, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim. To succeed on a Motion to Dismiss under Rule 12(b)(6), Verizon must show that, when all factual allegations in the plaintiff's complaint are treated as true, the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court must confine itself to the allegations in the pleadings in making this determination. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The factual allegations in the complaint are accepted as true and the plaintiff is given the benefit of any reasonable inference that can be drawn from the allegations. Mylan Labs v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993).

If the federal law claims are dismissed, Verizon argues, no independent basis exists for federal jurisdiction over the state law claims. Verizon then asks the Court to dismiss the state law claims for lack of jurisdiction. Accordingly, the analysis of Verizon's Motion to Dismiss must begin with a count-by-count examination of Cavalier's claims under federal law.

A. Count One: Monopolization

Claims that ILECs, such as Verizon, are not providing adequate access to facilities do not necessarily state a claim under § 2 of the Sherman Act, 15 U.S.C. § 2. It is equally true that the 1996 Act is not at odds with federal antitrust laws, but rather imposes more specific duties than those contained in federal

antitrust laws.[1] Given these two certainties, this Court is left to discern whether the factual allegations contained in Cavalier's Complaint state an actual antitrust claim under the Sherman Act or whether they merely represent violations of the 1996 Act dressed up

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[1] 'The relationship between federal antitrust law and the 1996 Act is made clear by the very language of the 1996 Act: Section 601(c)(1) states that the Act "shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided." Telecommunications Act of 1996, § 601, 110 Stat. 56 (1996). Furthermore, Section 601(b)(1) of the 1996 Act states that nothing in the Act "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Id., § 601(b)(1).

Since antitrust laws represent a "fundamental national economic policy," industry regulations do not generally render antitrust laws inapplicable to the industry. Square D. Co. v. Niagara Frontier TariffBureau Inc., 476 U.S. 409, 421(1986). When determining whether the repeal of antitrust laws can be inferred, the Fourth Circuit employs a two-part analysis: (1) Is there an "affirmative showing of a legislative intent to repeal," and (2) is there a showing that federal antitrust laws and the regulatory scheme in question cannot be reconciled? North Carolina ex rel. Edmisten v. P.I.A. Ashville, Inc., 740 F.2d 274, 280 (4th Cir. 1984) (citing Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City, 628 F.2d 1050 (8th Cir. 1980), reversed, 452 U.S. 378, 382-83 (1981)).

No such inference can be drawn from the 1996 Act. The language of the 1996 Act makes it clear that no legislative intent to repeal federal antitrust laws existed. Furthermore, while the 1996 Act imposes more specific duties on ILECs than those found in antitrust laws, those duties "do not conflict with the antitrust laws..." Goldwasser v. Ameritech Corp., 222 F.3d 390, 401 (7th Cir. 2000). Given that the intent the 1996 Act was to foster more competition in the telecommunications market, the purpose underlying the 1996 Act can be reconciled with federal antitrust laws.

in antitrust garb. A careful review of the Complaint reveals they are the latter.

Even a monopolist does not have a responsibility to help its competitors. Abcor Corp. v. Am Int'l. Inc., 916 F.2d 924, 929 (4th Cir. 1990) (citing Olympia Equip. Leasing v. Western Union Telegraph, 797 F.2d 370, 375 (7th Cir. 1986)). In Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000), the Seventh Circuit seized on this principle and held that the 1996 Act went far beyond the monopolization provision of the Sherman Act, 15 U.S.C. § 2, by imposing affirmative duties on ILECs. Goldwasser, 222 F.3d at 400-1. Indeed, it is clear that the 1996 Act creates "more specific and far-reaching obligations" than those embodied in § 2 of the Sherman Act. Id. at 401.[2] Under the 1996 Act, Congress tasked ILECs with the duty to provide interconnection, unbundled access to network elements, and collocation to their own competitors. 47 U.S.C. § 251(e)(2), 251(c)(3), 251(e)(6). Such specific obligations extend far beyond the general admonitions against monopolization and anti-competitive behavior expressed by federal antitrust law.

As a result, Cavalier cannot state a claim under § 2 of the Sherman Act if it alleges violations of affirmative duties created by the 1996 Act. In fact, the Goldwasser court went further and dismissed a generically stated antitrust claim because it was "inextricably linked" to the claims under the 1996 Act. In Goldwasser, the

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2 Ultimately, in Goldwasser, the Seventh Circuit upheld the district court's dismissal of a monopolization claim under § 2 of the Sherman Act on grounds that the claim did nothing more than state alleged violations of the 1996 Act. Goldwasser, 222 F.3d at 402.

allegations were actually grounded in the 1996 Act, with specific sections of the Act referenced. Goldwasser, 222 F.3d at 394-95. While Cavalier avoids such tell-tale references in its Complaint, it is nevertheless clear that Cavalier alleges nothing more than violations of duties imposed on Verizon by the 1996 Act. That Cavalier's Complaint did not characterize its allegations as violations of the 1996 Act is beside the point. Such a shallow interpretation of the relationship between the 1996 Act and antitrust law would relegate the matter to a mindless word game played out at the pleading stage: Parties that omit references to the 1996 Act from their complaint could potentially proceed with an antitrust claim and those that referenced the 1996 Act in their complaint would virtually always see their antitrust claims dismissed. The correct test is whether the factual allegations contained in the Complaint amount to antitrust violations.

In its Complaint, Cavalier alleges a series of actions that it believes amount to monopolization. It divides these claims into seven basic categories: (1) Interconnection Obstacles; (2) Collocation Obstacles; (3) Pre-Order and Ordering Issues; (4) Facilities Assignment; (5) Provision of Last-Mile Facilities; (6) Network-Related Problems; and (7) Billing. Cavalier makes certain factual allegations in regard to each of these categories and characterizes Verizon's actions not as "affirmative" violations of the 1996 Act, but rather as violations of "negative duties" imposed by federal antitrust law. See generally USM Corp. v. SPS Technologies. Inc., 694 F.2d 505, 513 (7th Cir. 1982) (indicating that antitrust laws impose negative duties). Regardless of how these factual allegations are

characterized, it is clear that they are violations of duties imposed by the 1996 Act. A closer analysis of each of these seven categories underscores this point.

Cavalier first alleges anti-competitive behavior in regard to the provision of interconnection services. Complaint, ¶¶ 49-55. It contends that Verizon delayed its entry into the market by refusing to agree to interconnection until Cavalier presented a certificate of public convenience and necessity. Complaint, ¶¶ 49-51. Even after interconnection service was provided, Cavalier asserts that Verizon did not provide sufficient trunks – communications lines that link switching stations – to carry Cavalier's telephone traffic. Complaint, ¶¶ 52-53. The result was a blockage of calls to Cavalier's customers in the Tidewater region. Complaint, ¶ 54. Lastly, Cavalier claims that Verizon misrouted calls and caused a complete outage in Northern Virginia. Complaint, ¶ 55.

Cavalier never mentions the 1996 Act in making these allegations. However, the 1996 Act clearly dictates that Verizon must provide interconnection and must do so in a way that is "at least equal in quality to that provided by the local exchange carrier to itself. . . ." 47 U.S.C. § 251(a)(1), 251(c)(2)(C). Cavalier does not contend that Verizon failed to provide interconnection services, but rather has presented a series of allegations that go to the quality and timeliness of the interconnection services Verizon has provided and is providing to Cavalier. The 1996 Act squarely addresses this issue, leaving no question that Cavalier, in making its argument on this point, is doing no more than mischaracterizing an alleged violation of the 1996 Act as a monopolization claim.

Collocation is the next issue raised in Cavalier's Complaint. Cavalier asserts that Verizon has delayed making space available in Verizon's central office for collocation, that Verizon has overcharged for the space, that Verizon has made Cavalier wait lengthy periods of time for such space to become available, and that Verizon has imposed "non-competitive prices" and "burdensome rules" for collocation. Complaint, ¶¶ 56-65.

The Complaint avoids mention of the duties imposed by the 1996 Act in regard to collocation. Nevertheless, the 1996 Act clearly imposes such duties upon Verizon. According to the 1996 Act, Verizon must provide collocation under "reasonable and nondiscriminatory" rates and conditions. 47 U.S.C. § 251(c)(6). In its Complaint, Cavalier is simply taking issue with the reasonableness of the terms and rates that Verizon is setting for collocation. As such, the issue falls within the 1996 Act and not, as Cavalier contends, under the Sherman Act.

Cavalier also considers Verizon's handling of pre-ordering and ordering of services to be anti-competitive. Its Complaint indicates that Verizon has made the process of ordering last-mile facilities "lengthy, complex, and expensive," that Verizon has provided inferior databases and web based interfaces for ordering loops or last-mile facilities, and that Verizon personnel have contacted Cavalier customers in an attempt to dissuade these customers from purchasing or continuing to has again raised a duty or obligation created and imposed by the 1996 Act. According to the 1996 Act, Verizon must provide access to "network elements on an unbundled basis"

on reasonable and nondiscriminatory terms and conditions. 47 U.S.C. § 251(c)(3).[3]

If Verizon is, in fact, providing access to these facilities through error-laden or slow databases and web-based interfaces, the issue is one concerning the quality of service Verizon is providing in regard to its obligations under the 1996 Act. Consequently, the key analytical point becomes whether the manner by which Verizon makes these facilities available to

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3 Cavalier's allegation that Verizon employees contacted Cavalier's existing and potential customers in an attempt to draw business away from Cavalier is the single factual allegation in the Complaint that addresses anti-competitive behavior and does not concern a duty imposed by the 1996 Act. However, this issue alone, when coupled with the multiple violations of the 1996 Act that Cavalier basically alleges without referencing the Act itself, is not enough to support a monopolization claim.

In fact, the Goldwasser court faced a similar scenario. After determining that many of the claims detailed in that complaint fell outside of antitrust and within the parameters of the 1996 Act, the Seventh Circuit dismissed a more general antitrust claim on the basis that it was "inextricably linked" to other claims. Goldwasser, 222 F.3d at 400.

Cavalier's claim that Verizon employees contacted current or potential Cavalier customers and made certain misrepresentations – although it cannot be properly characterized as a general antitrust claim – suffers the same fate. In fact, Cavalier makes this allegation as an illustration of how Verizon's ordering process has resulted in "marketing disadvantages" for Cavalier. Complaint, ¶¶66-71. As a result, the allegation itself represents, at best, an extension of Cavalier's contentions about ordering – an issue covered by the 1996 Act and its mandate that Verizon provide interconnection, unbundled access, and collocation under reasonable rates and conditions.

Cavalier is "reasonable" under the 1996 Act. The end result is that Cavalier is attempting to take a claim that Verizon is not living up to its duties as established by the 1996 Act and transform it into a monopolization claim.

Cavalier then turns to the assignment of facilities, alleging that Verizon uses systems and procedures that cause delays and make the process expensive. Complaint, ¶¶ 83-90. The Complaint, again without mentioning the 1996 Act, states that Verizon uses an inaccurate database to track the availability of ports, which are essential in connecting last-mile facilities. Complaint, ¶¶85-88. The 1996 Act mandates that Verizon make unbundled network elements available and that it do so in a manner that "allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 25 1(c)(3). The Complaint leaves no doubt that Cavalier is basically challenging the reasonableness of Verizon's provision of certain facilities, specifically ports and last-mile facilities, as covered in the 1996 Act.

Cavalier then, in some detail, raises issues about the provision of last-mile facilities. It generally contends that Verizon has refused to provide integrated digital loop carriers, that certain facilities provided by Verizon either have a disproportionate number of problems or simply do not function properly, that Verizon has disconnected Cavalier customers and overbilled Cavalier customers, that Verizon has made the process for directory assistance listings and listings in directory publications burdensome, that Verizon has imposed costly "loop

conditioning" charges as a means of making Cavalier's efforts to offer such services as digital subscriber, line services too costly, and that Verizon has frustrated Cavalier's efforts to resolve these issues. Complaint, ¶¶ 91-125.

Again, Cavalier is doing nothing more than arguing about the quality of the assistance Verizon is providing under the 1996 Act. The difficulty in construing these issues as claims of monopolization stems from the simple fact that the 1996 Act dictates that Verizon provide such services under reasonable conditions. Absent the 1996 Act, Verizon undoubtedly would not provide such assistance to Cavalier. Despite Cavalier's efforts to portray it as otherwise, the issue of the provision of last-mile facilities revolves entirely around whether or not Verizon's actions comport with what the 1996 Act mandates.

Cavalier next moves to network-related problems. In its Complaint, it argues that Verizon has made it difficult for Cavalier to mount fiber on Verizon's utility poles, has made it difficult for Cavalier to use Verizon's spare fiber-optic cable, and has generally impeded Cavalier's access to spare fiber. Complaint, ¶¶ 126-136. In addition to requiring interconnection, unbundled access, and collocation, the 1996 Act requires that Verizon allow access to poles, conduits, and ducts. 47 U.S.C. § 251(a)(1), 251(b)(4), 251(c)(2), 251(c)(3), 251(c)(6). Cavalier's allegations on this point boil down to an argument that Verizon is not allowing Verizon proper access to utility poles and is generally not making reasonable accommodations when it comes to interconnection and collocation. As such, Cavalier is not making a

monopolization argument as much as it is criticizing the manner in which Verizon is fulfilling its duties under the 1996 Act. Regardless of whether such criticism is warranted, the issues Cavalier raises cannot simply be separated from the duties imposed by the 1996 Act and brought to federal court under the guise of the Sherman Act.

Lastly, Cavalier alleges that Verizon has made the billing process regarding last-mile facilities costly by applying the wrong rates, not complying with the Bell Atlantic/GTE Merger Order, and by refusing to adjust charges to third parties. Complaint, ¶¶ 137-143. Under the 1996 Act, Verizon must provide interconnection, collocation, and unbundled network elements under reasonable conditions and at reasonable terms and rates. 47 U.S.C. § 251(c)(2), .251(c)(3), 25 1(c)(6). By attacking the billing process, Cavalier is essentially asserting that Verizon is behaving unreasonably in billing Cavalier for the services the 1996 Act mandates that Verizon provide to Cavalier. Such allegations, therefore, are grounded in the 1996 Act and do not amount to a monopolization claim.

Viewing these seven categories of allegation in their totality, it is evident that Cavalier is not asserting a monopolization claim under the Sherman Act, but rather is detailing alleged violations of duties imposed upon Verizon by the 1996 Act. Often the issue is not whether Verizon is providing the facility or service as directed by the 1996 Act, but whether Verizon is providing the facility or service to Cavalier in a manner that fits within the standard of reasonableness

established by the 1996 Act.[4] Regardless of whether such factual allegations have merit, they do not state a claim for monopolization.[5] Verizon's Motion to Dismiss the monopolization claim is, therefore, granted.

B. Count Two: Attempted Monopolization

Substantively, there is little difference between this claim and Cavalier's monopolization claim. Cavalier simply re-asserts its previous claims and states that Verizon has the "specific intent" to monopolize the basic telecommunications services

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[4] Verizon's actions, as detailed in Cavalier's Complaint, also do not rise to the level of predatory behavior. In Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), the Supreme Court recognized that monopolists have a qualified right to do business with whom they choose. Id. at 602-3. Exclusionary or predatory conduct, however, does not fall within the contours of this qualified right. Id. at 602-5. Predatory conduct "(1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." Id. at 605 n.32 (quoting 3 P. Areeda & D. Turner, Antitrust Law 78 (1978)).

Cavalier's allegations concern the manner in which Verizon is meeting its responsibilities under the 1996 Act. Although some of Cavalier's claims do contain egregious allegations of violations of the 1996 Act, its contentions are generally about the quality of the services and facilities offered. Claims that a particular process is overly complex, that overbilling has occurred, and that certain databases and interfaces contain inaccurate information do not amount to predatory conduct.

[5] Cavalier also bases part of its monopolization claim on a section of the Virginia authorizing treble damages for willful conduct. Va. Code § 59.1-9.12(b). But, since the Virginia Antitrust Act is to be harmonized with federal antitrust law, Cavalier's state law antitrust claims must fail if its federal antitrust claims fail. Oksanen v. Page Memorial Hospital, 945 F. 2d 696, 710 (4th Cir. 1991).

markets.[6] Since Cavalier's allegations do not state a claim for monopolization, they cannot be said to be sufficient to support a claim of attempted monopolization. Verizon's Motion to Dismiss is, therefore, granted in regard to this claim.

C. Count Three: Violation of the Lanham Act

This claim relates to Cavalier's allegations that Verizon employees misrepresented to potential Cavalier customers the cost and availability of certain Cavalier services and attempted to convince these consumers not to purchase services from Cavalier. Cavalier offers no specifies in the form of names and dates. Furthermore, it provides no indication of how many potential customers it believes Verizon contacted.

Cavalier nevertheless argues that Verizon's actions constitute a violation of § 43(a) of the Lanham Act, which allows civil liability for misleading commercial advertising. See 15 U.S.C. §1125. To make out a claim under § 43(a), a plaintiff must show that the misleading statements were commercial speech made by a competitor in an attempt to influence consumers. Such representations must be disseminated widely enough that they constitute advertising or promotion. Neurotron Inc. v. Am. Assoc. of Electrodiagnostic Medicine, 2001 U.S. Dist. LEXIS 16621, *9 (D. Md. 2001) (quoting Gordon & Breach Science Publishers, S.A. v.

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[6] A claim for attempted monopolization under § 2 of the Sherman Act has three elements: (1) the specific intent to monopolize the relevant market, (2) predatory or anti-competitive acts, and (3) a "dangerous probability" of success. M&M Medical Supplies & Services, Inc. v. Pleasant Valley Hospital. Inc., 981 F. 2d 160, 166 (4th Cir. 1992).

American Institute of Physics, 859 F. Supp. 1521, 1536 (S.D.N.Y. 1994)); Black & Decker (U.S.) Inc. v. Pro-Tech Power Inc., 26 F. Supp. 2d 834, 861-62 (E.D. Va. 1998). Generally, to survive a 12(b)(6) motion, a plaintiff claiming false advertisement under the Lanham Act must raise "sufficiently particularized allegations of false or misleading misrepresentations. . . ." Mylan Labs, 7 F.3d at 1138.

Cavalier does allege that misleading statements were made in "commercial advertising or promotion," but it provides no meaningful details. Complaint, ¶¶ 70-71, 198-205. In determining whether misleading statements constitute commercial speech both the method of communication and the purpose of the communication are instructive. Huntingdon Life Sciences v. Rokke, 978 F. Supp. 662, 666 (E.D. Va. 1997). In the present case, Verizon's directory publication personnel and sales personnel allegedly contacted Cavalier customers and made misrepresentations in an effort to persuade these customers not to purchase services from Cavalier.

Such alleged misrepresentations could be sufficient to fit within the rather broad definition of commercial speech.[7] Whether such misrepresentations

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[7] The Fifth Circuit, for example, examined the issue in Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379 (5th Cir. 1996), indicating that informal types of promotion can classify as "commercial advertising" if such promotion is done for the purpose of promoting and product and is "disseminated sufficiently" within the particular industry. Id. at 1284-85 (quoting Gordon & Breach, 859 F. Supp. at 1535-36). Indeed, § 43(a) can apply to fund-raising letters and even to instances where a person badmouths a former employer in telephone calls to friends and colleagues. See Gordon & Breach, 859 F. Supp. at 1535 (citations omitted).

actually qualify as commercial speech depends on the number of alleged contacts or misrepresentations made in relation to the total market. Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1386 (5th Cir. 1996). If the total market is small, isolated contacts may be enough. In the present case, Cavalier alleges that Verizon employees made misrepresentations to an unspecified. number of potential or existing Cavalier customers. A fair reading of these allegations, however, suggests that Verizon employees contacted Cavalier customers on multiple occasions ,for the apparent purpose of winning customers away from Cavalier.

Cavalier's allegations, however, remain far too vague to meet the particularity requirement. This fact becomes obvious when, as Verizon points out, this unspecified number of alleged contacts with Cavalier customers is placed in the context of a total market of at least several million Virginia telecommunications consumers. In such an expansive market, an unspecified number of isolated contacts cannot meet the standard of commercial advertising or promotion. As a result, Verizon's Motion to Dismiss is granted in regard to this claim.

D. Count Four: Violation of the Communications Act of 1934

Cavalier also asserts the Verizon violated the Communications Act of 1934 ("the 1934 Act") by failing to provide physical connections for Cavalier

and by imposing unjustly high rates.[8] Under 47 U.S.C. § 201, 202, ILECs are required to provide certain physical connections and to refrain from discrimination in charges and practices. 47 U.S.C. § 201-02.

Under the 1996 Act, however, parties that have entered into an interconnection agreement, as Cavalier and Verizon have, are bound by that agreement and their obligations are governed by that agreement. The FCC is clear on this point. It has indicated that local carriers have the choice of either pursuing an interconnection agreement under § 251 and 252 or of "taking tariffed interstate service" under expanded interstate connection rules. First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Red 15499, 15809, ¶ 611(1996).

Cavalier acknowledges in its complaint that is has an interconnection agreement with Verizon. Complaint ¶¶ 49-52, 271-74. Consequently, Cavalier must seek resolution of its claims under § 251 and § 252, not § 201 and § 202. Cavalier has not pled this count as a violation of §251 or § 252, so the count must be dismissed. Under Rule 12(b)(6), the Court must confine itself to the factual allegations of the pleadings and accept the allegations as true. Mylan

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[8] Cavalier requests an award of monetary damages under § 207, attorney's fees under § 206, $500 million in punitive damages, and a permanent injunction on this count.

Labs, 7 F.3d at 1134. Here, the appropriate claim has simply not been stated.[9]

E. Count Five: Violation of the Merger Order

Cavalier also asserts that Verizon has violated certain conditions of the Merger Order by which the FCC approved the merger of Bell Atlantic Corp. and GTE Corporation ("GTE"). Under 47 U.S.C. § 401(b), the Court has the power to enforce FCC orders. 47 U.S.C. § 401(b). The Court's power to enforce orders under this section is limited to instances where the order either requires or prohibits a specific action by a specific party.

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[9] Section 252 allows carriers to enter into binding agreements and § 251, in addition to establishing specific duties and obligations, indicates that carriers must provide interconnection under terms that are 'just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252." 47 U.S.C. §251 (e)(3).

The Fourth Circuit has recently indicated that § 252 confers jurisdiction on federal courts to review "determinations" made by the State Commission and whether the interconnection agreement meets the conditions set out in § 251. Bell Atlantic Md., Inc. v. MCI, Worldcom, Inc., 240 F.3d 279, 302-3 (4th Cir. 2001). Consequently, Cavalier argues, § 252 is only a limited remedy. Furthermore, § 206 and 207 allow Cavalier to bring suit for money damages in federal court, provided it has not already brought suit before the FCC. Conboy v. AT&T Corp., 84 F. Supp. 2d492, 497-98 (S.D.N.Y. 2000), aff'd, 241 F.3d 242 (2d Cir. 2001).

In fact, it seems clear that §§ 251 and 252 do not override §§ 206 and 207, even when it comes to obligations set out under § 251. Law Offices of Curtis v. Trinko, 123 F. Supp. 2d 738, 743 (S.D.N.Y. 2000). In Trinko, the court indicated that violations of 251 are still cognizable as § 207 claims. Id. at 742-43. At the same time, the Trinko court seemed to suggest that § 206 and 207 should not be used to circumvent the regulatory provisions of § 251 and 252. Id.

MGC Communs., Inc. v. BellSouth Telecomms., Inc., 146 F. Supp. 2d 1344, 1353 (S.D. Fla. 2001).

Cavalier alleges that the Merger Order's "fundamental goal" is that Verizon adopt the "best practices" of Bell Atlantic and GTE in interacting with local exchange carriers. Complaint, ¶ 223. Cavalier contends that Verizon has violated the Merger Order by following the "worst practices" of its predecessors. It relies on just one example to support this claim: It asserts that Verizon is now declining to offer high-capacity loops if certain components are not present in each circuit and that the wrong rates are being applied to last-mile facilities. Complaint, ¶¶ 139, 223-225.

The Merger Order, however, does not contain specific provisions applying to high-capacity loops. Cavalier, therefore, has failed to allege a specific instance where Verizon has failed to abide by the Merger Order.[10] Therefore, Verizon's Motion to Dismiss is granted in regard to this claim.

F. Count Ten: Breach of the Interconnection Agreement

Cavalier next asserts that Verizon has intentionally breached the Interconnection Agreement it reached with Cavalier and asks the Court to award it at $135 million in compensatory damages, $500 million in punitive damages, injunctive relief, and attorney's fees.

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10 Verizon also argues that, even though § 40 1(b) does apply to the Merger Order, it does not allow a party to collect damages. Conboy, 241 F.3d at 252. It only allows for the enforcement of orders. 14. This point is moot, since, in its Memorandum in Opposition to the Motion to Dismiss, Cavalier withdrew its claims for damages under § 40 1(b).

To the extent that these alleged breaches implicate matters falling with the expertise of SCC, they should be resolved before the SCC.[11] Furthermore, the only role courts play in such disputes is to review the determination of the SCC, and that judicial action is taken by a state court. Bell Atlantic Md., 240 F.3d at 306-7.

Federal courts have the power to review SCC "determinations" under 252.[12] Id.. at 307; see 47 U.S.C. § 252(e)(6). However, even if this Court were to find that SCC interpretations and enforcement decisions are to be categorized as determinations under § 252, then this Court must dismiss this claim and allow the SCC to make the determination. see generally Bell Atlantic-Virginia v. Worldcom Techs. Inc., 70 F. Supp. 2d 620 (E.D: Va. 1999) (indicating that the court lacked jurisdiction because the state commission had not yet made a determination); see GTE South v. Morrison, 957 F. Supp. 800, 805 (E.D. Va. 1997) (indicating that judicial review prior to the completion of SCC proceedings would undercut the purpose of the statute).[13]

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11 The SCC has authority over interconnection agreements and disputes arising from them. Bell Atlantic Md., 240 F.3d at 304..

12 ... 252(e)(6) confers jurisdiction on federal courts to review State commission 'determinations' under § 252 'to determine whether the agreement. . .meets the requirements of section 251 and this section [252].'' Bell Atlantic Md., 240 F.3d at 302 (quoting 47 U.S.C. §252(e)(6)).

13 It is also not clear that there is an issue of federal law involved in this alleged breach of contract that would support a claim of federal jurisdiction. Indeed, the Fourth Circuit has indicated that the fact that interconnection agreements are created under federal law does not confer federal question jurisdiction on disputes over interconnection agreements. Bell Atlantic Md., 240 F.3d at 308.

Cavalier's argument on this issue is not without merit[14] Circuit precedent, the role of federal courts in

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[14] Cavalier makes two basic assertions: (1) The contract dispute at issue does not necessitate special expertise on the part of the Court and (2) the agency in question cannot grant the relief. sought.

In regard to the first issue, Cavalier acknowledges that resolution of the contract dispute will likely involve some discussion of telecommunications policy and the reasonableness of Verizon's conduct. However, it asserts that alleged misconduct – double-billing, overly complex billing practices, erroneous telephone listings, and delayed performance – does not rise to the level of sophistication that requires the expertise of the FCC or SCC.

The Eleventh Circuit has recently indicated that allowing state commissions the sole power to interpret and enforce interconnection agreements basically relegates the regulation of local telephone service to these commissions. BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.. et al., 278 F.3d 1223, 1236(11th Cir. 2002). Such a wide grant of power to state commissions goes beyond the intent of Congress to give state commissions a limited role in regulation and exceeds the expertise of such commissions. Id. A state commission, lacking any knowledge of contract law, could violate "the most basic tenets of contract interpretation" and still remain free from judicial review since § 252(e)(6) limits judicial review to determinations of whether interconnection agreements comport with § 251 and 252. Id.

Cavalier also argues that the SCC cannot offer complete relief, so the Court should retain jurisdiction over the contract dispute. United States v. AT&T Co., 461 F. Supp. 1314, 1328 n.43 (D.D.C. 1978) (stating that "[i]t is not insignificant that, even with respect to that portion of defendants' activities which the Commission does regulate, only the courts can grant complete relief'). Cavalier seeks monetary damages, which the SCC acknowledges it cannot award. SCC Order in Cavalier Telephone, LLC v. Bell Atlantic-Virginia, Inc., Case. No. PUC990191 (June 15, 2000).

regard to interconnection agreements is limited. No SCC determination has been made that this Court can review. Thus, Verizon's Motion to Dismiss this claim is granted.

G. Counts Six Through Nine: State Law Claims

Cavalier's complaint also includes four state law claims: violation of the Uniform Trade Secrets Act, tortious interference with contract, tortious interference with prospective economic advantage, and intentional or negligent misrepresentation. Since each of Cavalier's claims under federal law has now been dismissed, it is apparent that no independent basis exists for federal court jurisdiction. If no diversity exists and federal question jurisdiction does not apply, a federal court should decline to exercise jurisdiction over state law claims. Parents, Alumni. & Friends of Taylor Sch. v. City of Norfolk, 37 F. Supp. 2d 435, 449 (E.D. Va. 1999) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)).

Cavalier attempts to assert that, in the absence of federal question jurisdiction, diversity jurisdiction exists[15], but its Complaint betrays this argument. When an unincorporated entity is party to a suit, jurisdiction depends on the citizenship of the members of that entity. Carden v. Arkoma Assocs., 494 U.S. 185, 195 (1990). Cavalier's Complaint indicates that Cavalier Telephone LLC's "sole member" is Cavalier Telephone

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[15] Cavalier argues that Virginia is not the principal place of business for Cavalier. Consequently, it asserts that Cavalier is not a corporate citizen of Virginia and diversity does exist between Cavalier and Verizon.

Corporation. Complaint, ¶ 3. It also states that Richmond, Virginia is the principal place of business of Cavalier Telephone LLC. Complaint, ¶ 2. It is also clear that the holding company – Cavalier Telephone Corporation – was formed for the sole purpose of owning and managing investment assets in Cavalier Telephone LLC. See Affidavit of Brad Evans, Memorandum in Opposition to Motion to Dismiss, Ex. 11.

The facts are remarkably parallel to those of Hereth v. Jones, 544 F. Supp. 111 (E.D. Va. 1982), where a company incorporated in Georgia existed for the sole purpose of being the corporate general partner in a nursing home venture in Virginia. Hereth, 544 F. Supp. at 112. In that case, the court held that, since "such activity as exists in Virginia is greater than the non-activity in any other State," the company was a Virginia resident for diversity purposes. Id.

In the present case, Cavalier Telephone Corporation, by all accounts, is a shell that holds Cavalier Telephone LLC, a company that operates in Virginia and holds ownership interests in Cavalier Mid-Atlantic, LLC. Essentially, Cavalier Telephone Corporation is a holding company that does nothing but hold an entity whose primary place of business is in Virginia. Indeed, Cavalier's own Complaint makes this very point. The fact that Cavalier Telephone LLC may have investments or ownership positions in entities doing business outside Virginia does not change the fact that Cavalier's principal place of business is Virginia.

As result, there is no question that, once the federal law claims are dismissed, all that remains are state law claims involving a Virginia plaintiff and a Virginia defendant. It is, therefore, inappropriate for the Court to retain jurisdiction over the state law claims. See generally Maday v. Toll Bros., 72 F. Supp. 2d 599,604 n. 19 (E.D. Va. 1999) (citing Arbee Mechanical Contractors. Inc. v. Capital Sun Corp., 683 F. Supp. 144, 146-47 (E.D. Va. 1988)).

III.

Cavalier's claims under federal law fail to meet the 12(b)(6) standard. As a result, its state law claims must also be dismissed for lack of jurisdiction. Consequently, Verizon's Motion to Dismiss is granted in full.

An appropriate Order shall issue.

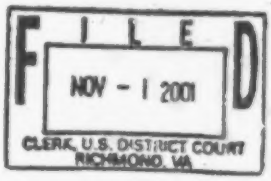
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

3:01CV736

Civil Action No. 01-____

JURY TRIAL DEMANDED

CAVALIER TELEPHONE, LLC)
)
versus)
)
VERIZON VIRGINIA INC.
)
Please serve:)
)
Robert W. Woltz, Jr.)
Verizon Virginia Inc.)
600 East Main Street, Suite 1100)
Richmond, Virginia 23219)



COMPLAINT

Plaintiff, Cavalier Telephone, LLC ("Cavalier"), brings this action against defendant, Verizon Virginia Inc. ("Verizon"), pursuant to section 2 of the Sherman Act, 15 U.S.C. § 2; section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); pertinent sections of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*; and other provisions of federal and state law, as enumerated below; and to obtain equitable relief and damages pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and other applicable law; and alleges as follows:

Nature of Action

1. Cavalier seeks injunctive relief and damages against Verizon arising out of Verizon's anticompetitive and exclusionary conduct aimed at excluding Cavalier from the relevant market for Basic Telecommunications Services in the Richmond, Tidewater, and northern Virginia areas and preserving Verizon's monopoly power in that market, thereby causing substantial harm to competition.

Parties

2. Plaintiff, Cavalier Telephone, LLC ("Cavalier"), is a Virginia limited liability company with its principal place of business in Richmond, Virginia.

3. Cavalier's sole member is Cavalier Telephone Corporation, a Delaware corporation that is a holding company with no principal place of business.

4. Defendant, Verizon Virginia Inc. (together with Bell Atlantic-Virginia, Inc. and any other predecessors in interest, "Verizon"), is a Virginia corporation with its principal place of business in Richmond, Virginia.

Jurisdiction

5. Cavalier brings this action pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and federal question jurisdiction of Cavalier's claims is based on 28 U.S.C. § 1331.

6. The Court also has jurisdiction of Cavalier's claims pursuant to 15 U.S.C. §§ 15 and 26, as an action brought by a person injured in its business or property by violation of the antitrust laws, and as an action for injunctive relief against a violation of the antitrust laws.

7. The Court has jurisdiction of Cavalier's antitrust and Lanham Act claims pursuant to 28 U.S.C. § 1337, an Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

8. The Court has jurisdiction of Cavalier's Lanham Act claims pursuant to 28 U.S.C. § 1338, as an action arising under an Act of Congress relating to trademarks, and pursuant to 15 U.S.C. §§ 1116 and 1117, as claims for damages and for injunctive relief arising under the Lanham Act, 15 U.S.C. §§ 1051-1129.

9. The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332, because, under the rule of Carden v. Arkoma Associates, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990), Cavalier is a citizen of Delaware; the action is thus between citizens of different States, and the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs.

10. The Court also has jurisdiction of Cavalier's claims under Virginia law pursuant to the court's supplemental jurisdiction under 28 U.S.C. § 1367, because those claims are so related to claims with the Court's original jurisdiction that they form part of the same case or controversy.

11. The Court has jurisdiction of Cavalier's claims under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, pursuant to 47 U.S.C. § 207, because Cavalier has brought suit to recover damages for Verizon's violation of the provisions of Title 47, Chapter 5 of the United States Code.

12. The Court has jurisdiction of Cavalier's claims for violation of an order of the Federal Communications Commission ("FCC") pursuant to 47 U.S.C. § 401(b), because Cavalier claims injury due to Verizon's failure to comply with, and seeks to enforce Verizon's compliance with, the FCC's June 16, 2000 Memorandum Opinion and Order, FCC 00-221, in *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC Docket No. 98-184 ("*BA/GTE Merger Order*").

Venue

13. Venue of Cavalier's claims for violation of the antitrust laws is proper in this Court pursuant to 15 U.S.C. § 22, because Verizon is an inhabitant of this district, and because Verizon may be found and transacts business in this district.

14. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), because (a) Verizon resides in this district within the meaning of 28 U.S.C. § 1391(c), (b) a substantial part of the events or omissions giving rise to Cavalier's claims occurred in this district, and (c)

Verizon may be found in this district, if there is no district in which this action may otherwise be brought.

Nature of Trade and Commerce

15. Verizon is the sole supplier of "last-mile" equipment and facilities required to compete in the Basic Telecommunications Services market.

16. Verizon directly competes in the product market for Basic Telecommunications Services which includes a cluster of products and services sold with local telephone service.

17. Verizon possesses approximately 90% of this market.

18. Cavalier also competes in the relevant product market by providing local telephone service, dial-up Internet access, high-capacity voice and data services, high-speed Internet access, private lines, and other telecommunications services over approximately 100,000 telephone lines.

19. To provide those services, Cavalier has, among other things, installed three Lucent 5ESS switches, assembled three fiber-optic networks that span approximately 150 miles each, installed equipment in 65 Verizon central offices, obtained regulatory approval and filed tariffs with the Virginia State Corporation Commission ("SCC") and FCC, obtained municipal franchises from over 20 municipalities, and hired over 400 employees to serve customers and maintain its facilities and equipment.

20. Other companies, such as Covad, Net 2000, Broadslate, and Cox Virginia Telecom, also compete in this market.

21. Cavalier and the other competitors and potential competitors require access to essential facilities controlled by Verizon, primarily the "last mile" of copper or fiber cable needed to reach individual homes and businesses from the Verizon central office.

22. Cavalier cannot reasonably or practicably duplicate these facilities, which were built over many years at the expense of customers under "rate of return" regulation of Verizon as a government-sanctioned monopoly.

23. Even though captive consumers paid for these facilities, Verizon still owns these facilities and uses them to reduce competition to these consumers.

Relevant Markets

24. As stated above, the relevant product market is Basic Telecommunications Services.

25. These services include plain old telephone service ("POTS"), dial-up Internet access, digital subscriber line services ("DSL") for high-speed Internet access, high-capacity voice and data services, voice-mail, access to long-distance services, calling features such as *67 and *69, and any other services that can be provided over last-mile copper or fiber-optic cable that links each customer to a central office.

26. Some of these services are regulated and some are not.

27. The relevant geographic markets consist of those parts of the Richmond, Tidewater, and northern Virginia urban areas where Verizon formerly held a regulated monopoly over Basic Telecommunications Services.

Summary of Alleged Conduct

28. Verizon has attempted to, and has, maintained its monopoly power in the relevant product and geographic markets through a series of exclusionary acts, each of which is aimed at either reducing or eliminating Cavalier's ability to reach end users, or raising the costs to Cavalier of competing with Verizon.

29. Some of Verizon's anticompetitive conduct, described below, independently violates other laws, including the Lanham Act, Virginia's Uniform Trade Secrets Act, and common law prohibitions against tortious interference with contractual relations and business expectancies.

30. The impact of Verizon's conduct has been both to harm consumers of basic telephone services in the relevant geographic markets and to cause Cavalier to lose substantial profits.

Verizon's Anticompetitive Conduct

1. Competition in Virginia's Basic Telecommunications Services Market

31. In 1995, Virginia's General Assembly followed the lead of several other states and ended Verizon's regulated monopoly over Basic Telecommunications Services.

32. In 1998, Cavalier was founded in Virginia by principals who had successfully competed against a similar company, Ameritech, by providing Basic Telecommunications Services to residential and business customers in Michigan.

33. Cavalier's founders believed that they would also be able to compete successfully against Verizon, because Cavalier possessed the relevant know-how, experience, financing, and equipment to enter the market and compete successfully.

34. Instead, Verizon has successfully limited competition by Cavalier and other competitors to a very small share of the market.

35. Verizon has done that by raising the costs of competing with Verizon as well as erecting absolute barriers to entry and competition.

36. Cavalier provides Basic Telecommunications Services through facilities and equipment that it owns and operates.

37. Those facilities and equipment include, among other things, three Lucent 5ESS switches, networks of fiber-optic cables, various other telecommunications equipment, and customer care, assignment, sales, sales support, translations, repair and dispatch, Internet services, information technologies, and billing departments.

38. These facilities and equipment are located in the Richmond, Tidewater, and northern Virginia areas, where Cavalier competes against Verizon in the areas where Verizon formerly held a government-protected monopoly over Basic Telecommunications Services.

39. However, Verizon controls certain facilities absolutely required for access to customers.

40. These facilities include the copper or fiber-optic cables connecting individual customer premises to Verizon's central offices where those lines are aggregated and connected to Verizon's network ("last-mile facilities").

41. Access over these last-mile facilities is essential to successfully providing Basic Telecommunications Services.

42. No other entity, including Cavalier, can duplicate these facilities in any reasonable or practicable way.

43. Last-mile facilities were built over many decades, at the expense of the public at a time when AT&T was a regulated monopoly.

44. With the break-up of AT&T almost twenty years ago, Verizon inherited the monopoly over the basic telephone line hook-up to each home and business in the relevant geographic market.

45. Those facilities can accommodate several competitors offering different basic telephone services.

46. Verizon has refused to make these facilities available to Cavalier in a manner that would allow Cavalier to compete on an equal basis.

47. Instead, Verizon has used its control of those facilities to prevent Cavalier from competing against Verizon

48. As described below, Verizon imposes a variety of obstacles and additional costs that hobble Verizon's competitors and that prevent competition on the merits.

2. Interconnection Obstacles

49. When Cavalier first sought to interconnect its network with Verizon's network, Verizon refused to agree to such interconnection until Cavalier obtained a certificate of public convenience and necessity from the Virginia State Corporation Commission ("the SCC").

50. Such a certificate was not necessary or required by any law as a precondition to interconnection.

51. The impact of Verizon requiring it was to delay Cavalier's entry into the market for Basic Telecommunications Services.

52. Even after Verizon agreed to the terms of interconnection with Cavalier, Verizon further delayed Cavalier from entering the market, by delaying the provision of trunks required for Cavalier to compete and by not establishing adequate trunks to carry

telephone traffic between Cavalier's customers and Verizon's customers.

53. Trunks are the communications lines that link two switching systems, such as Cavalier's Lucent 5ESS switches and the switching equipment in Verizon's central offices.

54. Inadequate trunking resulted in a blockage of 25-70% of the calls to many Cavalier customers in the Tidewater region, undermining Cavalier's ability to compete and damaging Cavalier.

55. Verizon has also misrouted Cavalier's calls in the Tidewater area, and caused a complete outage for Cavalier in northern Virginia, again undermining Cavalier's ability to compete and damaging Cavalier.

3. Collocation Obstacles

56. Cavalier has a comprehensive fiber-optic network connecting its switches to Verizon's central offices, where Verizon's last-mile lines are aggregated.

57. To connect with these lines, Cavalier must place equipment within Verizon's central office, just as other competitors do and just as long-distance companies have done for decades.

58. Verizon has used its control over the central office to raise Cavalier's costs, delay competition, and blockade entry.

59. For example, Verizon sought to charge Cavalier unpredictable amounts that in one case exceeded $400,000, solely for so-called "space preparation" for a ten foot by ten foot floor space required by Cavalier in the central office.

60. Verizon then "decided" that the cost was supposedly a uniform $47,686.20 for all such spaces, not an amount of up to $400,000.

61. Even the $47,686.20 was far higher than comparable charges for the same space preparation in states such as Massachusetts and Rhode Island.

62. Such artificial charges are imposed solely to harm competitors and competition.

63. Even after accepting such charges, Cavalier was forced to wait over 600 days for space in some Verizon central offices.

64. Further, Verizon typically refuses to make space available until expiration of the maximum "interval" imposed by Verizon, even if the space could be made available at an earlier time.

65. Verizon also engages in other anticompetitive practices against Cavalier and other competitors, such as charging non-competitive prices for the modicum of power needed at collocation sites, and imposing arbitrary and unnecessarily complex and burdensome rules for collocation.

4. Pre-Order and Ordering Issues

66. Verizon further made the process of identifying and ordering last-mile facilities excessively lengthy, complex, and expensive.

67. This conduct creates important marketing disadvantages.

68. For instance, after the customer authorizes it, Cavalier requests from Verizon customer service records, to identify what services a customer currently receives from Verizon and the charges for such services.

69. Verizon's wholesale organization improperly makes this information available to Verizon's directory publication personnel, Verizon's retail sales personnel, and others.

70. As a result, Verizon's directory publication personnel have contacted existing or potential customers of Cavalier and made misrepresentations to such customers concerning the availability and/or the cost of directory listings or directory assistance listings if such customers agree to buy, or continue to buy, Basic Telecommunications Services from Cavalier.

71. As a further result, Verizon's retail sales personnel have contacted existing or potential customers of Cavalier and made misrepresentations about Cavalier or its services, and/or tried to convince such customers not to buy, or continue to buy, Basic Telecommunications Services from Cavalier.

72. Moreover, the "loop qualification database" that Verizon makes available to Cavalier and other competitors is inferior in comparison to the databases utilized by Verizon's retail business.

73. This inequality creates further competitive disparities.

74. Specifically, the database made available to Cavalier and other competitors does not contain accurate information about last-mile facilities, and therefore causes problem for Cavalier and other competitors who try to provide Basic Telecommunications Services to customers over those facilities.

75. Further, Verizon initially identified only one method for Cavalier to order last-mile facilities from Verizon, a Web-based graphical user interface that is inferior to a functional, application-to-application service ordering process.

76. That interface is frequently slow or completely "down" for an entire day, at times that are completely unpredictable to Cavalier.

77. Cavalier therefore loses hours or entire days of employee time to process orders for last-mile facilities.

78. The Web-based interface and other systems made available by Verizon do not function as well, or in the same manner as, the systems that Verizon itself uses.

79. The Web-based interface also creates many problems for Cavalier because it is slow and unpredictable in returning firm order confirmations, which are basically an acknowledgement of the order placed by Cavalier for last-mile facilities.

80. Problems with the interface, and Verizon's use of a process requiring that the same order information be entered manually multiple times for each order, also cause repeated errors, as well as delay and uncertainty in when Verizon actually provides the last-mile facilities ordered by Cavalier.

81. As a result, Verizon usually provides the facilities to Cavalier after the due date that Verizon itself has established, and sometimes long after the due date.

82. By comparison, Verizon is usually able to provide its own retail customers with service in a just two to three days.

5. Facilities Assignment

83. Verizon assigns last-mile facilities using systems and procedures that are intentionally flawed and unnecessarily complex, delay-ridden, and expensive.

84. This conduct raises competitors' costs and reduces competition.

85. For example, Cavalier has a certain number of "ports" to connect with last-mile facilities for individual customers served out of each central office.

86. Verizon insists on assigning these ports by maintaining a separate database to track the ports, and will not connect facilities to the port that Cavalier asks Verizon to use.

87. Because of inaccuracies in Verizon's database, Verizon frequently refuses to connect facilities to a certain port that Verizon will say does not exist or is already being used by another customer.

88. Verizon refuses to do so even if Cavalier assures Verizon that the port exists or that Cavalier is not already providing dial tone to a customer through that port.

89. Verizon's systems and procedures for assigning facilities have also caused problems for Cavalier with respect to circuit identification, automatic line information codes, multiple firm order confirmations for the same order, "jeopardy" notices, and other issues.

90. These problems extend to the disconnection of last-mile facilities for individual Cavalier customers, as well as the initial connection of last-mile facilities.

6. Provision of Last-Mile Facilities

91. Verizon has also implemented systems and procedures that are flawed, overly complex, delay-ridden, and expensive, in the provision of last-mile facilities.

92. First, Verizon refuses to provide Cavalier with last-mile facilities on integrated digital loop carriers ("IDLCs"), which serve almost 25% of Verizon's lines in Virginia.

93. Verizon claims that it is not "technically feasible" to provide such facilities, even though other companies such as BellSouth provide access to such last-mile facilities within its former regulated monopoly territory.

94. Verizon exacerbates this problem by refusing to provide Cavalier with any reliable indication of when a particular customer is served by an IDLC line, preventing Cavalier from serving Cavalier's customers effectively.

95. Instead of timely providing accurate information to Cavalier, Verizon often delays until the due date for delivery of service, or the day before, to tell Cavalier about an IDLC issue, making competition difficult.

96. At that point, Cavalier is not only unable to offer service, but appears incompetent to the customer because of the last-minute announcement.

97. Even when Verizon does provide "spare" facilities, such facilities have caused so many problems, such as problems with modem speed for dial-up Internet customers, that Cavalier was forced to stop advertising its popular and innovative "Internet caller ID" service.

98. Verizon thus deliberately deprives Cavalier and other competitors of access to information about last-mile facilities, and then uses its exclusive control of such information to make Cavalier and other competitors look bad in the eyes of customers.

99. In addition, the high-capacity facilities that Verizon provides to Cavalier have had a disproportionately high number of problems.

100. Cavalier has used these high-capacity lines to provide Basic Telecommunications Services consisting of both voice and data services.

101. These "bad" facilities have caused Cavalier to lose customers and suffer damage to its reputation and good will.

102. Moreover, Verizon has also provided a disproportionately high number of ordinary last-mile facilities that do not function upon their delivery for use by Cavalier's customers.

103. These non-functional facilities have imposed undue delay and expense on Cavalier, and have also caused Cavalier to lose customers and suffer damage to its reputation and good will.

104. Verizon has also imposed costs on Cavalier's existing or potential customers through the premature disconnection of customers who unexpectedly lose telephone service in the process of switching to Cavalier as their provider of Basic Telecommunications Services.

105. In September 2000, Verizon disconnected over 100 customers in this fashion in just one week, by intentionally refusing to coordinate the disconnection of Verizon's services and the delivery of last-mile facilities to Cavalier.

106. Verizon has further imposed problems on Cavalier's customers by continuing to bill those customers for time periods after those customers started obtaining Basic Telecommunications Services from Cavalier.

107. Verizon also instructed its billing personnel to refuse to talk to any of Cavalier's customers, even when those customers called the telephone number that Verizon itself had listed on the bills as the number to contact if they had a question about the Verizon bill.

108. Again, this intentional misconduct by Verizon simply caused unnecessary frustration, delay, and wasted resources for Cavalier and its customers.

109. Verizon has also intentionally imposed unreasonable systems for directory assistance (411) listings and listings in directory publications.

110. Verizon controls both the publication of printed directories and the electronic listings in the directory assistance database.

111. Verizon's burdensome process for directory publication listings has forced Cavalier to dedicate employees to the problem on a full-time basis.

112. This same process has caused Cavalier many problems, and one customer lawsuit to date.

113. Verizon's intentionally costly approach to both directory assistance and directory publications have caused Cavalier unnecessary problems with customer listings and with customers relationships.

114. Verizon also manipulates the charges and practices used to provide certain last-mile facilities.

115. For example, with high-capacity last-mile facilities, Verizon recently changed its practice of providing such facilities.

116. Instead, Verizon began refusing to provide such facilities on the same basis, and requiring Cavalier to order such facilities on a retail, rather than wholesale, basis.

117. Verizon then proposed to offer these same services at a price lower than Cavalier's "retail" cost for high-capacity facilities, or at a price so low that Cavalier could not profitably offer such services if forced to obtain last-mile facilities at the "retail" cost.

118. Verizon has also sought to impose costly charges on Cavalier for "loop conditioning," or the removal of equipment that Verizon itself has placed on certain lines.

119. Such equipment must be removed before Cavalier can offer digital subscriber line services, or high-speed Internet access, over last-mile facilities.

120. Although Cavalier has sought to resolve this issue since August 1999, Verizon continues to propose rates that are unreasonably high, are anticompetitive, and do not comply with the constraints imposed by the BA/GTE Merger Order.

121. Ostensibly because of the lack of agreement on this issue, Verizon has outright refused to allow Cavalier to offer digital subscriber line services on loops beyond a certain distance from the central office—loops on which Cavalier, but not Verizon, had been able to offer such services.

122. With these anticompetitive charges, Verizon is trying to raise the cost of last-mile facilities to a point where it is higher than the retail cost of Verizon's digital subscriber line services, or to a point where Cavalier cannot profitably offer its own digital subscriber line services.

123. Finally, when Cavalier and other competitors seek to resolve any of these problems, Verizon stalls by creating an "issues matrix," scheduling repetitive and unproductive conference calls and meetings, and simply repeating the same position again and again, with no intention of resolving the problem.

124. These many conference calls, meetings, and other methods of obfuscation simply impose additional cost and delay upon Cavalier and other competitors.

125. The overall goal of Verizon's tactics, and the cumulative effect of those tactics, is to drive Cavalier out of the market for Basic Telecommunications Services in the Richmond, Tidewater, and northern Virginia areas.

7. Network-Related Problems

126. Verizon has also intentionally imposed additional delay and expense on Cavalier during Cavalier's effort to build fiber-optic networks linking its switches to Verizon's central offices.

127. First, Verizon imposed an unnecessarily complex, lengthy, and expensive process for Cavalier to mount its fiber on Verizon's utility poles or to pull its fiber though conduit systems owned by Verizon.

128. These poles and conduits are part of the bottleneck facilities controlled by Verizon and used to stifle competition.

129. Specifically, Verizon has used its control of these poles and conduits to block Cavalier's network-building, resulting in delays of as long as 250 days for access to these necessary items.

130. Moreover, where Cavalier has also encountered issues with poles and conduits owned by Dominion Virginia Power, Verizon has prevented a unified solution to such issues and has also made it needlessly complex, time-consuming, and expensive for Cavalier to use Verizon's spare fiber-optic cable.

131. For example, after the FCC required Verizon to make available such spare fiber, Verizon imposed an irrational and unreasonable set of procedures that were intentionally designed to impede Cavalier's efforts to obtain such fiber, procedures that the FCC has not addressed.

132. As with access to lines on IDLC, Verizon claimed that it was not "technically feasible" to implement the process requested by Cavalier.

133. The disingenuousness of this response was demonstrated when Verizon later sought approval to offer long-distance in Pennsylvania, and settled Cavalier's objection concerning spare fiber by implementing exactly the solution that Verizon had earlier insisted was not "technically feasible."

134. Further, even when Cavalier finally obtained spare fiber and other inter-office facilities from Verizon, Cavalier has had problems with those facilities.

135. At one point, Verizon interrupted all service to Cavalier's northern Virginia switch for a period of several hours, leaving Cavalier's customers completely without service.

136. More recently, Verizon has also impeded Cavalier's access to spare fiber between Verizon's central offices and specific customer premises.

8. Verizon's Error-Laden Bills

137. As part of its anticompetitive campaign, Verizon has also intentionally made billing for last-mile facilities a costly and difficult process for competitors.

138. Both the U.S. Department of Justice and Arthur Andersen LLP, as well as competitors of Verizon, have identified problems with Verizon's billing procedures with competitors, and Cavalier has experienced similar billing problems in multiple areas.

139. For example, Verizon's bills for "unbundled network elements," or last-mile facilities, suffer from several problems, including application of the wrong rate elements and non-compliance with conditions imposed by the BA/GTE Merger Order, all aggravated by Verizon's use of different billing systems.

140. Cavalier has disputed these bills, and the adequacy of services that are the subject of the bills, but Verizon has initiated collections procedures and taken other threatening and predatory actions, even while promising to provide reconciliations and to meet with Cavalier to resolve the issues.

141. Verizon has also intentionally created problems for Cavalier by refusing to adjust its charges to third parties, such as charges to municipalities for services related to E911, to account for the fact that Cavalier and not Verizon now performs such services for Cavalier's customers.

142. As a result, Verizon has caused Cavalier to become embroiled in disputes over tariffed charges by Cavalier to municipalities.

143. All of Verizon's billing-related conduct has caused Cavalier wasted time and effort, burdened Cavalier with voluminous paper bills that Verizon refuses to provide in electronic format, left Cavalier unaware of how much it truly owes and thus unable to plan its financing reliably, and served as a pretense for Verizon to deny and threaten to deny the continued provision of services.

Verizon's Exclusionary Conduct Harms Competition

144. Verizon's campaign to suppress competition has successfully imposed so much additional cost and delay on competitors that Verizon has reduced competition in the market for Basic Telecommunications Services and harmed consumers.

145. Verizon has used its control of last-mile facilities to drive a number of competitors to file for bankruptcy, cease offering services in Virginia, or abandon plans to offer services in Virginia.

146. For example, competing providers of voice and data services like PICUS Communications of Virginia, Inc., which was based in the Tidewater area of Virginia, have gone bankrupt and ceased providing service.

147. Competing providers of broadband services, such as Rhythms Links, Inc.-Virginia, Broadband Office Communications-Virginia, and Everest Connections Corporation of Virginia, have likewise either gone bankrupt, ceased providing service in Virginia, or scuttled plans to offer service in Virginia.

148. These competitors typically offered lower prices, better services, or more innovative services than Verizon.

149. Like many competitors, Cavalier offers Basic Telecommunications Services at prices that are 15-25% lower than Verizon's prices.

150. The costs imposed by Verizon and its exclusionary conduct deprive customers of lower-cost alternatives to Verizon.

151. Cavalier has also introduced new services that Verizon does not offer, or had not yet offered, such as Internet caller identification and talking caller identification services.

152. By driving competitors from the marketplace, and by delaying and limiting Cavalier's ability to offer services, Verizon has caused consumers to pay higher prices for Basic Telecommunications Services and has prevented consumers from obtaining the benefit of innovative services.

Harm to Cavalier

153. Verizon has also harmed Cavalier in a number of ways, through individual categories of anticompetitive conduct, and also through the cumulative impact of such actions on Cavalier and its customers.

154. First, Verizon delayed Cavalier's entry into the market for Basic Telecommunications Services in the Richmond, Tidewater, and northern Virginia areas.

155. That delay cost Cavalier revenues that it would have received absent such a delay.

156. Second, Verizon has directly imposed unnecessary and additional costs on Cavalier.

157. Third, Cavalier has lost customers due to Verizon's actions.

158. Fourth, Cavalier has suffered significant harm to its reputation and good will because of Verizon's actions.

159. Fifth, Cavalier has encountered a higher cost of securing investment and financing because of Verizon's actions.

Related Regulatory Actions

160. Cavalier has sought regulatory intervention in several of its problems with Verizon.

161. In a formal complaint that involved some of the issues described above, the Virginia State Corporation Commission ("the SCC") declined to arbitrate any issues under 47 U.S.C. § 252, declined to address any issues under federal law, and found that it lacked authority to award Cavalier monetary damages under any circumstances.

162. In a separate proceeding related specifically to premature disconnection of customers' service, the SCC found that Verizon had acted improperly, but declined to penalize Verizon, and instead simply ordered its Staff to monitor the situation.

163. In response, Cavalier withdrew its formal complaint at the SCC.

164. Cavalier has also sought expedited relief from the FCC in two cases.

165. In one case, Cavalier asked the FCC to place the spare fiber dispute on the FCC's "accelerated docket" for expedited decision-making, and Verizon responded that the solution sought by Cavalier was not "technically feasible."

166. Cavalier was unable to make any progress until Verizon agreed to implement Cavalier's proposed solution, to overcome Cavalier's objection to Verizon's request for long-distance authority in Pennsylvania.

167. In the other case, Cavalier asked the FCC to place the issue of Verizon's new policy on high-capacity loops on the accelerated docket, but the FCC has not acted.

168. Cavalier recently learned that of 67 requests for accelerated docket treatment in almost two years, the FCC had granted only one request.

169. Cavalier has therefore brought this civil action against Verizon, because both the SCC and the FCC appear to lack the tools to address the many competitive obstacles erected by Verizon.

First Cause of Action: Monopolization

170. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

171. Verizon possesses monopoly power in the market for Basic Telecommunications Services in the Richmond, Tidewater, and northern Virginia areas, as shown by, among other things, its possession of a dominant share of the market in those areas.

172. Substantial entry barriers prevent new rivals from easily entering this market.

173. Those entry barriers include, without limitation, state regulatory requirements for entering the market, local regulatory requirements for entering the market, the substantial sunk costs required to acquire and build other telecommunications equipment and facilities, such as switches and fiber-optic networks, and Verizon's control of essential facilities.

174. These entry barriers prevent new rivals from timely responding to increases in price above the competitive level or from timely responding to the lack of innovation in the market.

175. By engaging in the exclusionary conduct described above, Verizon has willfully and illegally maintained its monopoly power in the market for Basic Telecommunications Services in the Richmond, Tidewater, and northern Virginia areas.

176. Through its refusal to deal, Verizon is willfully and illegally maintaining its monopoly power in the market for Basic Telecommunications Services in the Richmond, Tidewater, and northern Virginia areas.

177. Verizon also controls the last-mile facilities needed for Verizon, Cavalier, or other competitors to provide Basic Telecommunications Services over those facilities in the Richmond, Tidewater, and northern Virginia areas.

178. Cavalier is unable to duplicate those facilities in any reasonable or practicable way.

179. Verizon has denied the use of those facilities to Cavalier by engaging in the conduct alleged above.

180. It is feasible for Verizon to provide these facilities to Cavalier.

181. Through its conduct, as alleged above, Verizon has charged or sought to charge Cavalier wholesale prices for last-mile facilities that are higher than the Basic Telecommunications Services that Verizon provides over those last-mile facilities.

182. Alternatively, Verizon has charged or sought to charge Cavalier wholesale prices for last-mile facilities that are so high that Cavalier cannot profitably offer Basic Telecommunications Services over those facilities.

183. As alleged above, competition has suffered as a direct and proximate result of Verizon's maintenance of its monopoly power.

184. Also as a direct and proximate result of Verizon's conduct, Cavalier has suffered damages in an amount to be fully determined at trial, and estimated to be at least $45 million, which should be trebled to $135 million pursuant to 15 U.S.C. § 15.

185. Because Verizon's actions are willful and flagrant, Cavalier further requests that it be awarded treble damages pursuant to Virginia Code § 59.1-9.12(b).

186. In addition to awarding Cavalier an appropriate amount of monetary damages, Cavalier respectfully requests that the Court issue a preliminary and permanent injunction barring Verizon from any further violation of § 2 of the Sherman Act, pursuant to 15 U.S.C. § 26 and Virginia Code § 29.1-9.12(a).

Second Cause of Action: Attempted Monopolization

187. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

188. By engaging in the conduct alleged above, Verizon has engaged in predatory, anticompetitive, and exclusionary conduct.

189. These anticompetitive practices by Verizon evince Verizon's specific intent to monopolize the market for Basic Telecommunications Services.

190. Verizon has a dangerous probability of regaining market power in the market for Basic Telecommunications Services in the Richmond, Tidewater, and northern Virginia areas.

191. Although competitors initially began to lure away customers in this market, through lower prices and better and more innovative services, Verizon's anticompetitive practices have created a dangerous probability that Verizon will regain monopoly power in these markets.

192. As alleged above, Verizon has market power in the market for last-mile facilities used to provide Basic Telecommunications Services.

193. Verizon has used that power, through the misconduct alleged above, to foreclose competition, to gain or preserve a competitive advantage, and to destroy competitors in the distinct market for Basic Telecommunications Services.

194. As alleged above, competition has suffered as a direct and proximate result of Verizon's maintenance of its monopoly power.

195. Also as a direct and proximate result of Verizon's conduct, Cavalier has suffered damages in an amount to be fully determined at trial, and estimated to be at least $45 million, which should be trebled to $135 million pursuant to 15 U.S.C. § 15.

196. Because Verizon's actions are willful and flagrant, Cavalier further requests that it be awarded treble damages pursuant to Virginia Code § 59.1-9.12(b).

197. In addition to awarding Cavalier an appropriate amount of monetary damages, Cavalier respectfully requests that the Court issue a preliminary and permanent injunction barring Verizon from any further violation of § 2 of the Sherman Act, pursuant to 15 U.S.C. § 26 and Virginia Code § 29.1-9.12(a).

Third Cause of Action: Violation of the Lanham Act

198. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

199. Through its conduct, as alleged above, Verizon, in connection with services, used in commerce false and misleading descriptions or misleading representations of fact.

200. These false and misleading descriptions or misleading representations of fact, in commercial advertising or promotion, misrepresented the nature, characteristics, and qualities of Cavalier's services.

201. Verizon has thus violated § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

202. As a direct and proximate result of this conduct in violation of § 43(a) of the Lanham Act, Cavalier has suffered damages in an amount to be determined at trial.

203. Because Verizon's actions in violation of § 43(a) the Lanham Act have been willful and wanton, Cavalier respectfully requests that it be awarded treble the amount of any actual damages, pursuant to § 35 of the Lanham Act, 15 U.S.C. § 1117(a).

204. Because of the exceptional nature of this case, as demonstrated by Verizon's blatantly willful, predatory, and anticompetitive campaign against Cavalier, Cavalier respectfully requests that it be awarded reasonable attorney fees as the prevailing party, pursuant to § 35 of the Lanham Act, 15 U.S.C. § 1117(a).

205. Finally, in addition to awarding Cavalier an appropriate amount of monetary damages and other relief, as requested above, Cavalier respectfully requests that the Court enter a preliminary and permanent injunction barring Verizon from any further false statements, pursuant to § 34 of the Lanham Act, 15 U.S.C. § 1116(a).

Fourth Cause of Action: Violation of the Communications Act of 1934

206. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

207. Through its conduct, as alleged above, Verizon has not provided physical connection to Cavalier, another carrier, in accordance with the orders of the FCC.

208. Verizon has therefore violated § 201(a) of the Communications Act of 1934, 47 U.S.C. § 201(a).

209. Through its conduct, as alleged above, Verizon also has imposed charges and practices on Cavalier that are unjust and unreasonable.

210. Verizon has therefore also violated § 201(b) of the Communications Act of 1934, 47 U.S.C. § 201(b).

211. Through its conduct, as alleged above, Verizon has imposed unjustly and unreasonably discriminatory charges and practices, including charges for, and/or services in connection with, the use of common carrier lines of communication.

212. Verizon has therefore also violated §§ 202(a) and 202(b) of the Communications Act of 1934, 47 U.S.C. §§ 202(a) and 202(b).

213. Verizon's conduct, as alleged above, constitutes violations of Chapter 5 of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

214. As a direct and proximate result of Verizon's conduct in violation of Chapter 5 of the Communications Act of 1934, as specified, above, Cavalier has suffered damages in an amount to be fully determined at trial.

215. Pursuant to 47 U.S.C. § 207, Cavalier respectfully requests that it be awarded monetary damages to compensate it for these damages.

216. Pursuant to 47 U.S.C. § 206, Cavalier further respectfully requests that it be awarded a reasonable counsel or attorney's fee in this matter.

217. Because Verizon's actions are intentional, deliberate, and malicious, Cavalier further requests that it be awarded an additional $500 million in punitive damages.

218. Finally, in addition to awarding Cavalier an appropriate amount of monetary damages, and other relief as requested above, Cavalier respectfully requests that the Court enter a preliminary and permanent injunction barring Verizon from any further violation of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

Fifth Cause of Action: Violation of BA/GTE Merger Order

219. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

220. In the BA/GTE Merger Order, the FCC approved the merger of Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE") subject to certain conditions that were intended to help promote competition in local telephone markets.

221. However, since the merger, Verizon, the company formed by that merger, has repeatedly violated the terms of the BA/GTE Merger Order.

222. Auditors, such as Arthur Andersen and Mitchell & Titus, have noted some violations of the order.

223. Verizon's conduct has also contravened a fundamental goal of the BA/GTE Merger Order, that Verizon adopt the "best practices" of Bell Atlantic and GTE in unifying their practices for interaction with competitive local exchange carriers.

224. For example, instead of continuing its past practices in providing high-capacity loops, Verizon recently adopted what appears to be a former GTE practice of denying access to such facilities if certain components are not present at each end of the circuit.

225. Verizon thus adopted the "worst practices" instead of the "best practices" of its predecessors.

226. As a direct and proximate result of Verizon's violation of the BA/GTE Merger Order, Cavalier has suffered monetary damages in an amount to be fully determined at trial.

227. Because Verizon's actions have been intentional, deliberate, and malicious, Cavalier further requests that it be awarded an additional $500 million in punitive damages.

228. In addition to awarding Cavalier an appropriate amount of monetary damages, Cavalier respectfully requests that the Court issue a preliminary and permanent injunction barring Verizon from any further violations of the Bell Atlantic/GTE Merger Order.

Sixth Cause of Action: Violation of Uniform Trade Secrets Act

229. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

230. Cavalier's information about existing and prospective customers, and particularly the fact that these customers may or will switch to another provider of Basic Telecommunications Services, is information that derives independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

231. This customer information is the subject of efforts that are reasonable under the circumstances to maintain its secrecy and is not limited to the type of customer information or customer proprietary network information described in 47 U.S.C. § 222.

232. Verizon has used this information without Cavalier's express or implied consent when Verizon, at the time of such use, knew that this information was acquired under circumstances giving rise to a duty to maintain its confidentiality or limit its use.

233. Verizon used the information to its own economic benefit in breach of Verizon's duty to maintain the confidentiality of the information.

234. Verizon had a duty not to disclose this information, but Verizon nonetheless made this information available to its directory listing sales personnel and to its retail sales personnel.

235. As a result, Verizon's directory listing and retail sales personnel contacted Cavalier's existing or prospective customers and sought to intimidate them into not buying, or not continuing to buy, Basic Telecommunications Services from Cavalier.

236. As a direct and proximate cause of Verizon's misuse of the confidential customer information described above, Cavalier has suffered damages including but not limited to loss of customers, loss of revenue, and loss of profits, in an amount to be fully determined at trial.

237. Because Verizon's actions have been intentional, deliberate, and malicious, Cavalier further requests that it be awarded an additional $500 million in punitive damages.

238. In addition to awarding Cavalier an appropriate amount of monetary damages, Cavalier respectfully requests that the Court issue a preliminary and permanent injunction barring Verizon from any further misappropriation of Cavalier's trade secrets.

Seventh Cause of Action: Tortious Interference with Contract

239. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

240. Cavalier has entered into contracts with both residential and business customers.

241. Verizon has knowledge of these relationships.

242. Verizon has knowledge of the name, address, and other particulars of each new residential and business customer that is switching to Cavalier as the provider of local telephone service, because of documentation that Verizon requires Cavalier to submit as part of the pre-order, ordering, and provisioning processes.

243. Verizon has intentionally acted to induce or cause breach or termination of these relationships, through the intentional misconduct and other actions alleged above.

244. Such conduct has had the effect of inducing or causing breach or termination of Cavalier's contractual relationships with its business and residential customers.

245. As a direct and proximate result of Verizon's conduct, Cavalier has suffered damages including but not limited to increased costs, loss of customers, loss of revenue, loss of profits, and damage to reputation and good will, in an amount to be fully determined at trial.

246. Because Verizon's actions have been intentional, deliberate, and malicious, Cavalier further requests that it be awarded an additional $500 million in punitive damages.

247. In addition to awarding Cavalier an appropriate amount of monetary damages, Cavalier respectfully requests that the Court issue a preliminary and permanent injunction barring Verizon from any further interference with Cavalier's contractual relations.

Eighth Cause of Action: Tortious Interference with Prospective Economic Advantage

248. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

249. Cavalier has entered into contracts with residential and business customers.

250. Cavalier has also had the expectancy of a business relationship with business and residential customers.

251. Cavalier has had the probability of future economic benefit from both the existing business relationships and the expectancies of business relationships.

252. Verizon has knowledge of these relationships.

253. Through Cavalier's submission of requests to Verizon for customer service records, Verizon has knowledge of the name, address, and other particulars of each prospective residential and business customer that is considering switching to Cavalier as a provider of local telephone service.

254. It was reasonably certain that these residential and business customers would have continued their business relationship with Cavalier or commenced a business relationship with Cavalier, absent intentional misconduct by Verizon.

255. Verizon interfered with these business relationships and expectancies through its improper conduct, as alleged above.

256. Verizon's improper conduct included, without limitation, intentional violations of the federal antitrust laws, Virginia's antitrust laws, Virginia's Uniform Trade Secrets Act, applicable provisions of the Communications Act of 1934, applicable terms of the BA/GTE Merger Order, and applicable FCC regulations.

257. Verizon's improper conduct also included, without limitation, intentional efforts to interfere with Cavalier's existing or potential customers through misrepresentations to such customers by Verizon's directory publication personnel and retail sales personnel, as alleged above.

258. Verizon's improper conduct also included, without limitation, Verizon's efforts to cause delay, uncertainty, added expense, unnecessary complexity, and extraneous problems in the provision of last-mile facilities to Cavalier, as alleged above.

259. As a direct and proximate result of Verizon's intentional misconduct and interference with Cavalier's business relationships and business expectancies, Cavalier has suffered damages including but not limited to increased costs, loss of customers, loss of revenue, loss of profits, and damage to reputation and good will, in an amount to be fully determined at trial.

260. Because Verizon's actions have been intentional, deliberate, and malicious, Cavalier further requests that it be awarded an additional $500 million in punitive damages.

261. In addition to awarding Cavalier an appropriate amount of monetary damages, Cavalier respectfully requests that the Court issue a preliminary and permanent injunction barring Verizon from any further interference with Cavalier's prospective business relations.

Ninth Cause of Action: Intentional or Negligent Misrepresentation

262. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

263. Verizon has misrepresented material facts to Cavalier concerning the actual costs of physical collocation, the availability of spare fiber and other last-mile facilities, the availability of fully functional operations support systems, and other aspects of access to Verizon's last-mile facilities.

264. Verizon made these misrepresentations either intentionally, or with reckless disregard for the truth of falsity of the representations or negligently, without reasonable basis for making the representations.

265. Verizon made these false representations with the knowledge that Cavalier would rely to its detriment upon such representations.

266. Cavalier reasonably relied on these representations and as a direct and proximate result of this reliance suffered damages that increased the cost of operations and caused the loss of customers, loss of revenues, loss of profits, and damage to Cavalier's good will and reputation.

267. As a direct and proximate result of Verizon's misrepresentations, Cavalier has suffered damages in an amount to be fully determined at trial.

268. To the extent that Verizon's misrepresentations have been intentional, deliberate, and malicious, Cavalier further requests that it be awarded an additional $500 million in punitive damages.

269. In addition to awarding Cavalier an appropriate amount of monetary damages, Cavalier respectfully requests that the Court issue a preliminary and permanent injunction barring Verizon from any further misrepresentations.

Tenth Cause of Action: Breach of Contract

270. Cavalier restates the allegations set forth in the paragraphs above as if fully set forth herein.

271. On January 13, 1999, Cavalier entered into an Interconnection Agreement with Verizon.

272. The agreement is a legally binding contract between Cavalier and Verizon.

273. This contract established a series of commitments by Verizon for Cavalier to interconnect its network with Verizon's network.

274. Since entering into the agreement, Verizon has intentionally acted contrary to express provisions of that contract, and in breach of the contract, as set forth above.

275. As a direct and proximate result of Verizon's breach of contract, Cavalier has suffered damages in an amount to be fully determined at trial.

276. In addition to awarding Cavalier an appropriate amount of monetary damages, Cavalier respectfully requests that the Court issue a preliminary and permanent injunction barring Verizon from any further breaches of this contract.

WHEREFORE, for the reasons stated above, plaintiff, Cavalier Telephone, LLC respectfully requests that the Court enter judgment in its favor and against defendant, Verizon Virginia Inc., and grant Cavalier the following relief:

(a) trial by jury of all its claims so triable;

(b) compensatory damages in an amount currently estimated to be at least $45 million, trebled to at least $135 million;

(c) punitive damages of $500 million;

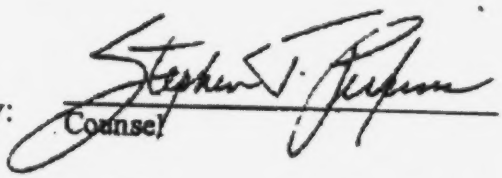
(d) preliminary and permanent injunctive relief as requested above;

(e) the award of costs and attorneys' fees as requested above; and

(f) such other monetary damages and such other legal and equitable relief to which Cavalier may be entitled.

Respectfully submitted,

CAVALIER TELEPHONE, LLC

By:  Counsel

Dated: November 1, 2001.

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* An application for admission *pro hac vice* is being filed contemporaneously with this Complaint.

15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court

47 U.S.C. § 251

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty -

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all

such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -

> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the

terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty -

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether -

> (A) access to such network elements as are proprietary in nature is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that -

> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and

any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until

(i) such company has received a bona fide request for interconnection, services, or network elements, and

(ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its

request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification -

(A) is necessary -

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition.

Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) "Incumbent local exchange carrier" defined

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that -

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B) (i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if -

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title

47 U.S.C. § 252

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning -

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the

parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall -

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section -

(A) shall be -

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms

and conditions for reciprocal compensation to be just and reasonable unless -

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed -

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the

additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject -

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that -

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State

commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on

telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title

(2)

Supreme Court, U.S.
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No. 03-271

IN THE
Supreme Court of the United States

CAVALIER TELEPHONE, LLC,
Petitioner,

v.

VERIZON VIRGINIA INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Did the court of appeals err by affirming the district court's dismissal of petitioner's antitrust claims?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Verizon Virginia Inc. states the following:

Verizon Virginia Inc. is a wholly owned subsidiary of Verizon Communications Inc. Verizon Communications Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

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MEMORANDUM FOR RESPONDENT

Verizon agrees with Cavalier that the antitrust merits issue presented by Cavalier's petition is also presented in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682. This case should accordingly be held pending the Court's decision in that case. Furthermore, Verizon agrees with Cavalier that, if *Trinko* is resolved only on standing grounds and therefore does not address the substantive Section 2 question presented by Cavalier's petition, the Court should grant Cavalier's petition to resolve it.

Cavalier's suit illustrates several consequences that would follow from expanding Section 2 to recognize the new discounted-sharing duty asserted by Trinko and Cavalier. Cavalier has deployed the powerful weapon of treble-damages antitrust litigation to evade its indisputable responsibilities under the agreement governing its purchases from Verizon under the Telecommunications Act of 1996 (the "1996 Act") and to mount collateral challenges to and sidestep the determinations of expert regulators on the very matters it wants a jury to determine in this suit. Cavalier's suit thus confirms some of the reasons advanced by Verizon in *Trinko* for not adding a novel Section 2 duty to supplement the comprehensive regime of the 1996 Act.

1. Cavalier filed its antitrust complaint in response to Verizon's demand that Cavalier pay millions of dollars it indisputably owed for services it had been receiving for a year and a half under the parties' State-approved agreement. By the time Cavalier filed its complaint in November 2001, it was serving customers over more than 100,000 telephone lines that it had leased from Verizon. Yet, it had stopped paying any of its bills from Verizon almost a year and a half earlier, including the large amounts not even placed in dispute. Between July 2000 and December 2001, Cavalier paid *nothing at all* for the facilities and services that Verizon had provided, accumulating a debt of around $17 million. For all that period, despite receiving no payment, Verizon continued to meet Cavalier's requests to provide ever increasing

volumes of facilities and services as Cavalier increased its customer base.

Shortly after Cavalier filed its antitrust complaint, it moved for a temporary restraining order ("TRO") to force Verizon to provide still additional facilities to Cavalier – *i.e.*, to furnish new unbundled network elements for Cavalier to use to serve newly acquired customers. Even though Cavalier admitted that it was "not financially troubled" and "can pay its bills, even the full amount," and that it "owe[d] [Verizon] some money," Cavalier complained that if it paid what it owed it would "have no leverage." Oral Arg. Tr. at 17-18 (Nov. 16, 2001). Most of the $17 million of unpaid bills was not in dispute, yet Cavalier paid nothing even though the procedures for resolving billing disputes expressly set forth in the Verizon-Cavalier agreement require payment of undisputed amounts. The district court judge denied the request for a TRO, noting that Cavalier had "simply opted not to pay" its bills, "apparently in the hope of gaining some leverage" in negotiations with Verizon. Mem. Op. at 4 (E.D. Va. Nov. 21, 2001).

2. In pressing its antitrust claims below, one of Cavalier's key factual allegations – and the only instance in which Cavalier claimed it was denied access to any facility – involved loops provided over an "Integrated Digital Loop Carrier" (or "IDLC"). IDLC is a technology that Verizon and other telephone companies have used to improve the quality and reliability of regular voice telephone service. Traditionally, customers' premises have been connected to the telephone company's switch over copper wires that run the distance from the customer premises all the way to the switch. IDLC permits the telephone company to extend fiber optic cables from the switch into a neighborhood or office park. At that point, the fiber is connected at a "remote terminal" to copper loops that run the rest of the way to the individual homes and offices.

Unbundling a loop that is provided over IDLC is complicated because the fiber part of the loop is a single indivisible piece of glass and the separable copper part of the loop

originates in a small metal box out in a neighborhood, usually far from a rival's facilities. Notably, Cavalier brought the same complaint about Verizon's refusal to provide access to IDLC loops to the Federal Communications Commission ("FCC") in the proceeding where Verizon sought and won authority to offer long-distance service in Virginia.[1] Cavalier argued that Verizon could unbundle IDLC loops and that, in any event, Verizon had failed to make appropriate alternative facilities available. *See* Comments of Cavalier Telephone, LLC at 12-14, WC Docket No. 02-214 (FCC filed Aug. 21, 2002). The FCC specifically rejected Cavalier's claims, holding that "it is not technically feasible to unbundle an IDLC loop" and noting that, "[n]evertheless, Verizon provides unbundled loops where the customer is served by IDLC by using spare copper facilities at the terminal or by performing a line station transfer to make spare copper facilities available." *Virginia 271 Order*, 17 FCC Rcd at 21963, ¶ 148. Thus, the FCC specifically concluded that access to IDLC loops is *not* feasible and that Verizon *is* providing adequate alternatives to serve potential customers. Cavalier's complaint seeks to relitigate these and comparable questions before a lay jury applying general antitrust standards.[2]

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[1] *See* Memorandum Opinion and Order, *Application by Verizon Virginia Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, 17 FCC Rcd 21880 (2002) ("*Virginia 271 Order*"). The FCC granted the application, noting that "Verizon has taken the statutorily required steps to open its local exchange markets in Virginia to competition" and that, as a result, "barriers to competitive entry in Virginia's local exchange market have been removed, and . . . the local exchange market is open to competition." *Id.* at 21882, ¶ 1, 21988, ¶ 196.

[2] Indeed, the FCC has exhaustively and repeatedly addressed the scope of incumbent carriers' obligations to provide unbundled access to loops. Under the latest FCC order, Verizon is generally required to unbundle traditional telephone wires but is not required to unbundle next-generation fiber loops used to provide broadband service. *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, FCC 03-36, ¶¶ 199,

3. Cavalier seeks to sidestep or override the regulatory regime in other ways as well. Under the 1996 Act, Verizon and Cavalier are parties to a "binding" agreement governing the terms on which Cavalier is entitled to use Verizon's facilities or services, and that agreement "fulfill[s]" Verizon's access duties. 47 U.S.C. §§ 251(c)(1), 252(a)(1). That agreement bound Cavalier upon exhaustion of Cavalier's clear statutory rights to challenge the adequacy of terms before agencies and courts. *Id.* § 252(b), (c), (e).[3] Yet many of Cavalier's allegations seek to establish antitrust liability based on Verizon's *compliance* with the terms of the parties' binding agreement.[4]

For example, Cavalier alleges that Verizon violated the Sherman Act by refusing to provide service "until Cavalier obtained a certificate of public convenience and necessity" from the Virginia public utility commission. Compl. ¶ 49 (Pet. App. 75). But this is exactly what the parties' agreement provides, in accordance with Virginia law. *See* Verizon Mot. to Dismiss, Exh. 1, at 4, § 2.6 (E.D. Va. filed Dec. 26,

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200 (rel. Aug. 21, 2003). The FCC has drawn fine distinctions with regard to hybrid fiber/copper loops depending on technology and the nature of the services to be provided. *See, e.g., id.* ¶ 288. Cavalier seeks to relitigate those very issues before a lay jury in a private antitrust suit.

[3] Cavalier's claim (at 14) that Verizon "voluntarily signed" the interconnection agreement is incorrect. Even though the parties may negotiate the particular terms to implement Verizon's statutory duties, Verizon has no choice about whether to enter into agreements that will "fulfill" those duties. *See* 47 U.S.C. § 251(c)(1). By contrast, a requesting carrier need not accept any provision of a proposed interconnection agreement, but can instead obtain expedited arbitration by state commissions, which are bound to enforce the 1996 Act's requirements. *See id.* § 252(b), (c).

[4] In fact, all of Cavalier's allegations were originally claimed to constitute offenses under the 1996 Act and the Communications Act of 1934 as well as antitrust law. All of the claims were dismissed, and Cavalier – on the afternoon before the oral argument in the Fourth Circuit – dropped its appeal except on the antitrust issue, thereby setting up its appeal as a test case for the legal theory that alleged disputes under the 1996 Act can provide the basis for an antitrust claim.

2001) ("Verizon-Cavalier Agreement") (Verizon shall have "no obligation to perform under this Agreement until such time as Cavalier has obtained a Certificate of Public Convenience and Necessity"); Va. Code § 56-265.3(A) ("[n]o public utility shall begin to furnish public utility service within the Commonwealth without first having obtained from the Commission a certificate of public convenience and necessity"). Next, Cavalier complains that Verizon provided space for Cavalier's equipment in the central offices housing Verizon's network switches – a process known as "collocation" – at the "expiration of the maximum 'interval'" contained in the agreement, *i.e.*, in *compliance* with Verizon's obligations. Compl. ¶ 64 (Pet. App. 77); *see* Verizon-Cavalier Agreement, Attach. IV. Cavalier also alleges that Verizon had "imposed unreasonable systems for directory assistance . . . listings and listings in directory publications" (Compl. ¶ 109 (Pet. App. 84)) – although these systems are specified in the agreement, *see* Verizon-Cavalier Agreement, Attach. VIII, Exh. A. Cavalier challenges charges for "loop conditioning" (Compl. ¶ 118 (Pet. App. 85)) – maintenance required to provide services over some copper loops – although these charges are incorporated into the parties' agreement, *see* Verizon-Cavalier Agreement, Attach. I. And Cavalier challenges the process for provision of space on Verizon's telephone poles or in Verizon's underground conduits (Compl. ¶ 127 (Pet. App. 87)) – although this process is specified in the agreement, *see* Verizon-Cavalier Agreement, Attach. VI.

Even if Section 2 were expanded to include a generalized duty to assist rivals along the lines of Cavalier's complaint, allowing relitigation of such matters would have the same harmful effects on the regulatory regime that this Court has long recognized as impermissible under the filed-tariff doctrine. Because agreements entered into under Section 252 are subject to state commission approval and, once approved, are "binding," and because their terms are available to other requesting carriers (47 U.S.C. § 252(a)(1), (e), (i)), such agreements are filed tariffs. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (contract filed with responsible

regulator governing terms of service constitutes a tariff). The Court's filed-tariff decisions recognize the harms of disuniformity and agency bypass from allowing antitrust damages based on claims to better services or lower prices than the State-approved terms. *See, e.g., AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 225 (1998) (whenever a rate or service matter is "*specifically addressed* by the filed tariff," challenge to the tariff terms as unlawful is barred); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986).

4. If much of Cavalier's suit seeks to override its own agreement adopted through the regulatory regime, the suit also illustrates how Section 2 suits would needlessly and harmfully supersede the regulatory agencies' close enforcement of the terms established under that regime. In particular, in every State where Verizon has sought and obtained Section 271 approval – including Virginia – Verizon has established "Performance Assurance Plans" that "provide[] further assurance that the local markets . . . will remain open after Verizon receives section 271 authorization." *Virginia 271 Order*, 17 FCC Rcd at 21989, ¶ 198. Such performance plans embody specific performance benchmarks that Verizon must satisfy. The plans provide for remedy payments to individual carriers in cases where Verizon's performance falls below relevant standards. In Virginia alone, Verizon has more than *$200 million* at risk under its performance assurance plan each year.

These performance assurance plans were the result of industry-wide "collaborative" discussions, overseen by state regulators, in which Cavalier itself has participated.[5] Verizon and its rivals jointly worked out which aspects of Verizon's performance would be of the greatest significance to rivals and established incentives to ensure that, if Verizon failed to perform, it would be forced to compensate its rivals. The

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[5] *See Establishment of a Performance Assurance Plan for Verizon Virginia, Inc.*, PUC-2001-00226 (Va. State Corp. Comm'n estab. Nov. 1, 2001).

terms of these plans have been adopted by state commissions overseeing the process of ensuring adequate – but not excessive – assistance.[6]

Adding a possible antitrust damages remedy on top of the compensation already provided to rivals under relevant regulatory schemes not only produces a potential windfall for the competitor plaintiff but also risks wreaking economic havoc on companies whose regulatory obligations already create unprecedented burdens. If a by-product of the forced cooperation between Verizon and its rivals is a cascade of antitrust actions by competitors seeking any possible leverage for cheaper assistance, then the effort to promote competition in local communications markets will end with competition badly weakened and consumers worse off. Cavalier's suit exemplifies some of the reasons such consequences would readily flow from a novel expansion of Section 2 duties.

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[6] Many of the individual state performance assurance plans are based on the plan adopted by the New York Public Service Commission (the "NYPSC") in the course of the proceedings leading up to Verizon's (and the industry's) first successful Section 271 application. The NYPSC specifically considered allegations by some CLECs that the performance remedy payments were "inadequate" and that the "overall amount at risk is too low to be effective." Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan at 17, *Petition of New York Tel. Co.*, Cases 97-C-0271 & 99-C-0949 (N.Y. Pub. Serv. Comm'n Nov. 3, 1999). The NYPSC rejected those arguments, concluding that CLECs had underestimated the likelihood that discriminatory treatment would be detected, and that the dollars at risk under the plan were "substantial" and sufficient to deter any discriminatory conduct by Verizon. *Id.* at 17-18.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Trinko*; if *Trinko* does not resolve the antitrust merits issue presented, the Court should grant the petition and affirm the Fourth Circuit's judgment.

Respectfully submitted.

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No. 03-271

Supreme Court U.S.
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In The
Supreme Court of the United States

CAVALIER TELEPHONE, LLC,
Petitioner,

v.

VERIZON VIRGINIA INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Cavalier Telephone, LLC ("Cavalier") respectfully submits this reply brief in support of its petition for writ of certiorari. Both Cavalier and respondent, Verizon Virginia Inc. ("Verizon"), agree that this Court should hold Cavalier's petition pending a decision in *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, Case No. 02-682, and grant Cavalier's petition if *Trinko* is not resolved on the merits. See Pet. at 3; Resp. Opp. at 1.

The principal thrust of Verizon's argument is that Cavalier "seeks to sidestep or override the regulatory regime"[1] established by the Telecommunications Act of 1996, codified at 47 U.S.C. §§ 151 *et seq.* See Resp. Opp. at 4. Verizon erroneously posits the issue as one of whether the antitrust laws extend to conduct subject to federal regulation, when the real question is whether regulation displaces the antitrust laws. The courts have long rejected Verizon's position.

For example, examining anticompetitive conduct that also allegedly violated the Civil Aeronautics Act, the D.C. Circuit concluded that: "the same set of facts may give rise to both a violation of [the Act and] the antitrust laws. Although the second does not necessarily follow from the first, but is bottomed on its own statutory standards, the antitrust remedy of treble

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1. Verizon undercuts its own argument with its incessant assault upon the very regulatory regime to which it would have this Court defer. *See AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U.S. 366 (1999); *USTA* v. *FCC*, 290 F.3d 415 (2002); *Petition for Writ of Mandamus, USTA* v. *FCC*, Nos. 00-1012, 00-1015, *et al.* (D.C. Cir. Aug. 28, 2003).

damages is not defeated by the fact that the Civil Aeronautics Act is also violated." *S.S.W., Inc.* v. *Air Tans. Ass'n of Am.*, 191 F.2d 658, 664 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952).[2]

Other courts have reiterated that "in view of the importance of the antitrust laws to the unregulated part of the economy, the rule has been developed that the mere existence of a regulatory statute does not result in complete withdrawal of the regulated industry from the operation of the antitrust laws." *Sunoco Energy Dev. Co.* v. *Burlington N. Inc.*, 483 F. Supp. 119, 123 (D. Wyo. 1980) (quoting *S.S.W.*, 191 F.2d at 661).

The fundamental question raised by Cavalier's complaint against Verizon is not whether similar issues violate other laws, as Verizon wrongly argues (Resp. Opp. at 3-7), or whether Cavalier was denied other relief in rulings not before this Court for review (*id.* at 1-2). Rather, the issue is whether Cavalier alleged a valid cause of action against Verizon for violation of the antitrust laws. As both Cavalier and Verizon agree, if this Court does not decide that issue in *Trinko*, then it should decide the issue in this case.

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[2] *See also Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

CONCLUSION

The Court should hold the petition and, if the decision in *Trinko* does not resolve the question presented, grant certiorari.

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